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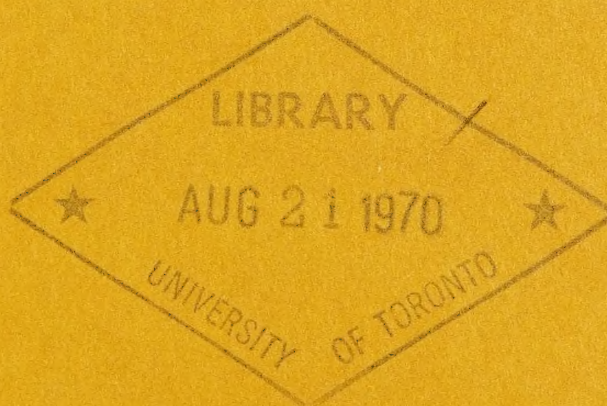
Task Force on Labour Relations

Study No. 11

Responsible Decision-Making in Democratic Trade Unions

Earl E. Palmer
A. M. (Yale), LL.M. (Toronto)

Faculty of Law
The University of Western Ontario



Privy Council Office
Ottawa

TASK FORCE ON LABOUR RELATIONS

(under the Policy Council Office)

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BY

EARL E. PALMER
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THE UNIVERSITY OF WESTERN ONTARIO

OTTAWA

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INTRODUCTION

The actual scope of this paper goes beyond that implied by its title and the delimitation of study included in the original contract and subsequently reproduced on the title page. More properly, it should be entitled, "Responsible Decision Making by Democratic Trade Unions". The reason for this lies in the fact that trade unions make collective bargaining decisions for many workers who are not their members. Consequently, in examining "responsible decision making", reference must be had to the bargaining unit as an entity and not just to the majority of the individuals of that unit which compose the union. The acceptance of this proposition as the proper point of departure has necessitated the study of material that relates both to the right of workers to enter unions as well as their position as non-members bound by union decisions.

To this end, the following chapter structure has been adopted: the first chapter, quite briefly, attempts to point out the significance of union membership in the mid-twentieth century and establish the limits within which changes may be affected. The second chapter deals with the problems raised by union security as a necessary preliminary to the examination of an individual's right to join a union and, once admitted, to remain there. These latter two topics are dealt with separately in the two chapters that follow. Having considered the question of membership per se, I then deal with the types of decisions unions may make with respect to its members; the repository of power to make such decisions being, to my mind, of equal importance with the process by which decisions are made. This is the topic of Chapter V. Finally, the last chapter deals with the methods used to administer union policy. This division permits the grouping of

such matters as strike votes, union trusteeships and access of individuals to the arbitration process into theoretical groupings which, it is hoped, make the conclusions sounder and the paper more readable.

In doing this work I have attempted to examine these problems in light of various types of material. Specifically, I have examined all the major legislation in Canada and other countries which have the same or similar systems of collective bargaining. Here, I have gathered and analyzed the specific wording of much of this legislation in Appendices A to H and J. The bibliography includes the secondary material in this field which I have uncovered. Parenthetically, and perhaps unnecessarily, I might point out that I was unable to read all this material; its collation, however, seemed a necessary initial step and of some value. Naturally, the decisions of not only common law but also the various administrative agencies in the field of labour relations (generally labour relations and arbitration boards) were studied as well.

To gather some idea of the scope of problems involved, a study was made of 50 union constitutions which give a good cross-section of Canadian organizations. The unions studied and their membership are listed at the end of this Introduction. In light of 1967 statistics 1/, these constitutions governed one million-plus union members and, quite obviously, affect many other employees. Included in the unions studied were the 11 largest, and the whole study covers approximately 52 per cent of all trade union members in Canada. Consequently, it might be regarded as being representative of Canadian unions generally. The work is patterned on and can be constructively compared with, the United States publication: U.S. Dept. of Labor, Disciplinary Powers and Procedures in Union Constitution (Bulletin

No. 1350, 1963). One caveat concerning the Canadian study exists, however, as it does not have a wide sampling of independent union or unions in the construction crafts: both of these groups may, and probably do, have provisions of a less democratic nature than the ones studied. In any event, the coverage actually obtained is of use.

Tables indicating the findings of this study are placed throughout the study where they best illustrate the points made. These tables are not in as polished a form as one would like but time does not permit further refurbishment.

Finally, a series of tables were compiled to show the record of court action in union disciplinary cases. These cover all litigation up to mid-1965 and were compiled from statistics in McAllister and Petrie, Background Notes and Addendum for the Industrial Relations Section of the Canadian Bar Association Meeting on September 2nd, 1965.

This last point leads to a general comment on the study contained herein. As a cursory glance at the magnitude of the material bearing on the issues raised in this paper will show, it has been impossible to deal with all of it in great detail. For example, more than 400 major articles in this field have been uncovered so far. Naturally, I could not read all of these, let alone the plethora of minor casenotes and comments, texts, court and board decisions, etc. Therefore, in all fields I have attempted to read the material that is apparently most relevant and representative of others not read. Similarly, in preparing this paper, time has drastically limited the detail with which issues could be dealt and, indeed, the expression of those so dealt with. It is hoped that what has been done will be of assistance. At the same time it is recognized that a great deal more

is required. It is my intention to continue work in this field: with so much work done, my appetite for continuing in the field has been whetted by the intrinsic appeal of the ideas necessary to its study and the basic feeling that one does not like to leave a job half-finished. It is my intention, therefore, to continue to develop this work over the next few years.

REFERENCE

- 1/ All statistics in this part of the paper are taken from Canada Department of Labour, Labour Organizations in Canada, 1967 (56th ed. 1967).

TABLE I

MEMBERSHIP OF NATIONAL AND INTERNATIONAL UNIONS STUDIED (1967)

<u>UNION (Affiliation)</u>	<u>Membership to nearest thousand</u>
United Steelworkers of America (AFL-CIO/CLC)	130,000
Canadian Union of Public Employees (CLC)	106,000
U.A.W. of America (AFL-CIO/CLC)	91,000
Int'l Bro. of Teamsters, Chauffeurs, Ware- housemen and Helpers of America (Ind.)	55,000
Int'l Bro. of Electrical Workers (AFL-CIO/CLC)	49,000
Int'l Association of Machinists and Aerospace Workers (AFL-CIO/CLC)	43,000
Int'l Bro. of Pulp, Sulphite & Paper Mill Workers (AFL-CIO/CLC)	40,000
Canadian Bro. of Railway, Transport and General Workers (CLC)	35,000
United Association of Journeymen and Apprentices of the Plumbing & Pipe Fitting Trade of the U.S. and Canada (AFL-CIO/CLC)	29,000
United Electrical, Radio and Machine Workers of America (Ind.)	25,000
Int'l Ladies' Garment Workers Union (AFL-CIO/CLC)	22,000
Bro. of Railroad, Trainmen (AFL-CIO/CLC)	21,000
Textile Workers' Union of America (AFL-CIO/CLC)	20,000
International Union of Operating Engineers (AFL-CIO/CLC)	20,000
Bro. of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employees (AFL-CIO/CLC)	18,000
Retail, Wholesale and Department Store Union (AFL-CIO/CLC)	18,000

con't...

UNION (Affiliation)	Membership to nearest thousand
Retail Clerks' Int'l Association (AFL-CIO/CLC)	18,000
Hotel & Restaurant Employees' and Bartenders' Int'l Union (AFL-CIO/CLC)	18,000
Building Service Employees' Int'l Union (AFL-CIO/CLC)	18,000
United Rubber, Cork, Linoleum & Plastic Workers of America (AFL-CIO/CLC)	17,000
Seafarers' Int'l Union of Canada (AFL-CIO)	14,000
Int'l Association of Fire Fighters (AFL-CIO/CLC)	14,000
Int'l Union of Mine, Mill & Smelter Workers (Canada) (Ind.)	13,000
Oil, Chemical & Atomic Workers' Int'l Union (AFL-CIO/CLC)	13,000
United Textile Workers of America (AFL-CIO/CLC)	12,000
Sheet Metal Workers' Int'l Association (AFL-CIO/CLC)	12,000
The Canadian Union of Postal Workers (CLC)	12,000
Int'l Association of Bridge, Structural and Ornamental Iron Workers (AFL-CIO/CLC)	12,000
Int'l Union of Electrical, Radio and Machine Workers (AFL-CIO/CLC)	12,000
United Papermakers & Paperworkers (AFL-CIO/CLC)	11,000
Office and Professional Employees Int'l Union (AFL-CIO/CLC)	10,000
United Fishermen and Allied Workers' Union (Ind.)	9,000
Transportation - Communication Employees' Union (AFL-CIO/CLC)	8,000
Int'l Bro. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers (AFL-CIO/CLC)	7,000
Traffic Employees' Association (Ind.)	6,000
United Glass & Ceramic Workers of North America (AFL-CIO/CLC)	6,000

con't...

UNION (Affiliation)	Membership to nearest thousand
Bricklayers, Masons & Plasterers' Int'l Union of America (AFL-CIO/CLC)	5,000
Lithographers & Photoengravers Int'l Union (AFL-CIO/CLC)	5,000
Commercial Telegraphers' Union (AFL-CIO/CLC)	5,000
Communications Workers of America (AFL-CIO/CLC)	3,000
American Newspaper Guild (AFL-CIO/CLC)	3,000
Int'l Longshoremen's & Warehousemen's Union (CLC)	3,000
National Association of Broadcast Employees & Technicians (AFL-CIO/CLC)	3,000
Journeyman, Barbers, Hairdressers, Cosmetologists & Proprietors' Int'l Union of America (AFL-CIO/CLC)	2,000
Association of Radio and Television Employees of Canada (CLC)	2,000
Saskatchewan Wheat Pool Employees' Association (CLC)	2,000
American Federation of Grain Millers (AFL-CIO/CLC)	2,000
Canadian Union of Operating Engineers (Ind.)	1,000
Brotherhood of Railroad Signalmen (AFL-CIO/CLC)	1,000
Canadian Air Line Flight Attendants' Association (CLC)	1,000

TABLE II

CONSTITUTIONS OF NATIONAL AND INTERNATIONAL UNIONS

STUDIED BY UNION SIZE, EARLY 1967

Union Membership	(Members in thousands)	
	Total Studied	
	Unions	Members
All constitutions	50	942
Under 1,000 members	-	-
1,000 members	3	3
2,000 "	4	8
3,000 "	4	12
5,000 "	3	15
6,000 "	2	12
7,000 "	1	7
8,000 "	1	8
9,000 "	1	9
10,000 "	1	10
11,000 "	1	11
12,000 "	5	60
13,000 "	2	26
14,000 "	2	28
17,000 "	1	17
18,000 "	5	90
20,000 "	2	40
21,000 "	1	21
22,000 "	1	22
25,000 "	1	25
29,000 "	1	29
35,000 "	1	35
40,000 "	1	40
43,000 "	1	43
49,000 "	1	49
55,000 "	1	55
91,000 "	1	91
106,000 "	1	106
130,000 "	1	130

CHAPTER I

THE SIGNIFICANCE OF UNION MEMBERSHIP

There are people in the labor movement who seem to believe that success can only come by entrusting great, yes absolute power in the hands of an individual and an executive officer. I warn you against a calamity none greater than which can occur to the labor movement. Autocracy is as dangerous in our movement as in a state. Mistakes may be made by the masses but they learn to do better by reason of their mistakes. The individual, on the contrary, when having absolute power, rarely makes mistakes, rather commits crime. The man who would arrogate to himself in the labor movement and autocratic power would be a tyrant under other circumstances, and has no place in the labor movement.

Samuel Gompers (1888)

The two central features of any investigation of the rights of individual employees affected by a collective bargaining regime are the extent to which unions, as certified bargaining agents, have been granted exclusive control over employment conditions in the bargaining unit and the extent to which the services provided by such unions are vital to its members. The first of these points is illustrated by a recent Supreme Court of Canada decision: 1/

The union is...the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee.... The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.... It [is] not within the power of the [individual] employee to insist on retaining his employment on his own terms, or on any terms other than those lawfully inserted in the collective agreement.

The second has two aspects: first, the kinds and extent of activities of unions have undergone substantial alterations in recent years—"fringe" economic benefits are burgeoning and political involvement has increased;

and, second, the significance of these benefits to members and non-members has heightened 2/ as job mobility has lessened in the face of economic costs of hiring older employees and automation. As has been stated: 3/ "...[A] stockholder of a corporation, if dissatisfied with its management, can sell his stock and invest elsewhere; a member of a union can resign - and starve." Thus it can readily be seen that not only the mere fact of membership, but also the extent to which an individual member can participate in and control union activities, is of far greater import by reason of the evolution of role of unions in society.

Given these points, the resolution of their inherent difficulties is a prodigious task. It has been made more difficult, however, by a continuation of the judicial policy of non-intervention in matters of union membership and the proliferation of union security legislation which, in some cases, has made employment dependent on union membership. Obviously, certain inequities have been created by this situation and these have come under attack from various quarters.

These changes have resulted in criticism of union security being continually placed before the layman 4/ and persons actively engaged in labour work. These critics demand abolition or drastic modification of the present situation because they claim that it gives union leaders too much power and thus saps the vitality of the labour movement 5/; that workers are left at the mercy of capricious union rules 6/; and that, generally, the individual is not given his "fair, democratic rights." 7/ On a slightly ludicrous level, it has even been suggested that union security is a major cause of unwarranted work stoppages. 8/ In rebuttal, proponents of union security say that it is an aid to the individual because it increases his influence

vis-à-vis his employer and gives him greater job security 9/; and, to the extent that individual workers' freedom is limited, such limitations are inevitable in a democratic society and the logical concomitant of the right of certified unions to be the exclusive bargaining agent of all workers in the bargaining unit. 10/ As an economic argument they also point to the advantages of having stable, industry-wide unions with whom management can negotiate agreements. 11/ On a less sophisticated level, it is stated that all workers should pay for the advantages gained by unions 12/ and that opposition to union security is merely a front for anti-union drives. 13/ Underlying these arguments, no doubt, is the traditional antipathy of the trade union movement towards any outside intervention in its internal affairs. 14/ In short, however, the real point seems to be whether economic convenience or untrammelled individual rights prevail. The dilemma thus becomes one of deciding which of the two propositions above to accept, or alternatively, to balance the need to maintain union unity in respect of its qualities as a bargaining agent with that of retaining freedom of the individual to obtain work.

Upon examination, it seems clear that the unionists are correct in claiming that some form of union security is an economic necessity; their arguments do not attain the same degree of success with respect to the continuation of the slight protection afforded employees in a pre-collective bargaining era when unions were placed in the same category as social clubs and the policy followed by the courts was one of non-intervention in their private affairs. At that time, except for requiring unions to adhere to their constitutions, little or no protection was afforded the individual member. 15/ Obviously, such an approach is inadequate to deal with the changing economic realities outlined above. As a rather belated result,

legislation has been passed which prevents unions from discriminating against a person on the basis of his race, colour, national origin, or religion, in their membership practices. 16/ But this protection was and is woefully weak as a remedy for the individual worker who is discriminated against in less obvious ways than in the fact of membership and on the basis of factors other than those dealt with in the legislation. It does not protect what might be called the quality of union membership 17/, the right to take part in union affairs without fear of reprisal, and the right to be fairly represented by the union.

As long as the economic objectives of union security are maintained, trade unions can claim no inherent sanctity from outside interference in this area, such sanctity resting on some vague conception of moral pre-eminence. 18/ Therefore, circumstances necessitate changes in this area of the law. The problem lies in the formulation of a system of guidelines or rules which, while protecting the individual, are not detrimental to the effective use of union bargaining power which arises from the implementation of the various forms of union security.

It is the purpose of this study to analyze the courts' attitude towards protection of workers represented by labour unions and also to examine the protection afforded this individual worker by the vast substratum of the "common law of employment" being evolved by administrative tribunals and labour arbitration boards that is so rapidly replacing the common law of master and servant. To this end the protection of the right to belong to a union, intervention in the expulsion of union members, and the protection afforded a union member vis-à-vis his participation in and control over union policies will be studied. Naturally, mere adumbration of these

points is not enough; solutions also must be proffered. Thus, having accepted the fact that change is inevitable and therefore desirable, certain questions arise. What bases should be used in evaluating the present situation and suggesting alternative forms of action? Further, what is the best method available to achieve these goals? Consequently, certain observations might be made at this time. Such comments need only be brief, however, as these views will be expanded later.

Two major schools of thought exist as to the policy that should underlie approaches to union government: the view that it should be modelled on "democratic" principles to the fullest possible extent and the position that union government should be tailored to assist the achievement of the central goal of a union—better collective agreements for its members.

The first position is summed up neatly by Professor Summer's statement that 19/, "The philosophy of legal rules developed to protect personal freedoms in our democracy can provide helpful guides in working out detailed legal rules." Case law abounds with ringing declarations relating to the need for "democratic" trade unions. 20/

If there be any public policy touching the government of labor unions, and there can be no doubt that there is, it is that traditionally democratic means of improving their union may be freely availed of by members without fear of harm or penalty. And this necessarily includes the right to criticize current union leadership and, within the union, to oppose such leadership and its policies.... The price of free expression and of political opposition within a union cannot be the risk of expulsion or other disciplinary action. In the final analysis, a labor union profits, as does any democratic body, more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus evidence.

Or again: 21/

Majority rule necessarily prevails in all constitutional governments, including our federal, state, county and municipal bodies, else payment of a tax levied for a duly authorized and proper objective could be avoided by the mere assertion of beliefs and sentiments opposed to the accomplishments thereof. In a government based on democratic principles the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligations because of a difference in personal views. A member of a voluntary association should not be permitted successfully to seek a similar avoidance.

The most touching, however, reads: 22/

None except a democratic union, however, can achieve the idealistic aspirations that justify labor organizations. ...[O]nly in a democratic union can workers, through chosen representatives, participate jointly with management in the government of their industrial lives, even as all of us may participate through elective representatives, in political government.

Several arguments are made against this type of approach (which, admittedly, is the fashionable one) by the functionalist. The first, which would seem to be unanswerable, is that democracy is not an end in itself to be gained by the labour movement but that better working conditions are. Consequently, it is agreed, stress on the means should not be detrimental to the ends sought. This position has been succinctly put by Professor Allen:23/

It is contended here...that trade union organization is not based on theoretical concepts prior to it, that is on some concept of democracy, but on the end it serves. In other words, the end of trade union activity is to protect and improve the general living standards of its members and not to provide the workers with an exercise in self-government.

The second line of argument stresses the inapplicability of democratic concepts to the trade union movement. Generally, the point is made that

democracy has been created to provide government for a society whose aims are diverse and its components disparate; therefore, because the ambit of objectives in unions is narrow and its membership homogenous, the democratic function does not follow the union form. Thus, the argument is that: 24/

It [attempting to get union democracy] is futile because ...the conditions that currently characterize unions - the complexity of their organizations, the increasing tendency to assume functions complementary to those of management; the status and salary gap existing between leaders and members, not to mention the psychological compulsion of the leaders to retain power, and the members' expectation that their union is primarily a service institution rather than a way of life - do not provide the soil in which the democratic process can operate.

In fact, democracy has not flourished in unions 25/, except on rare occasions and at the grass roots level 26/, nor can it be said to be a necessary concomitant of union organization. 27/ Consequently, to swallow this libertarian argument holus bolus is wrong. This is not to say that all the points put forward above are right. Clearly, for example, it does not follow that there are no distinct and strongly-held differences of opinion merely because the ranks of union come from, on the whole, the same class and the decisions they must make all fall within a fairly narrow and related range. 28/ Thus, there are areas where democratic principles may provide a basis for union government and, perhaps, the prima facie assumption should be that they should apply unless conclusive arguments to the contrary are brought forward; but still there are areas where an excess of democracy will assist no one--the union as an entity, the employer, the industry, the country as a whole or, indeed, the workers themselves. 29/ In these latter situations, democratic scruples have no place: in a political democracy, not all of its components should be required to mirror

this philosophy. It is sufficient to recognize a union's quasi-public nature 30/ without making it into a microcosmic democracy. Nevertheless, while such a state may be unattainable, it should at least be responsible and responsive to the rank and file union members. It may be that the latter element would be next to impossible to implement in any case and for that matter "responsive" government reeks of the democratic spirit. What various authorities have been able to agree upon 31/ has been reflected in The Donovan Commission Report 32/, recently published in the United Kingdom, where emphasis was placed on the need for procedural protection of members and non-members rather than on "democratic" reforms, and on the need for responsible leadership by the union executives. Thus, a union must simultaneously be responsible in its activities both to its members and in its attitude towards its place in the economy: in the case of the former, to promote its members' interests vis-à-vis their common employer; and in the latter, to view these interests not in an isolated perspective of one industry but in relation to the total perspective. One might call the process one of "rational and responsible decision-making". 33/

The method of approach to solve these problems also raises some difficulties. Without delving too deeply into the problem, it seems clear that the solution can come neither from requests for internal reform or from changes in the common law; independence and history militate against such possibilities. Change, therefore, must be made through legislation, i.e., by requiring trade unions to conform to statutory standards of behaviour. 34/

Some comments on the efficacy of legislation (far from exhaustive I might add) are relevant. First, legislation must start with the realization

that employers wish to deal only with unions and a remedy that merely permits individual employees to bypass the union and go to the employer is an illusory protection. 35/ Second, legislation based on disclosure is doomed to failure: as Professor Summers has noted: 36/

...[T]he 'goldfish bowl' theory assumes that public disclosure will tend to discourage questionable practices by exposing miscreants to public condemnation - an assumption of doubtful validity in the jungle world of union corruption.

To which he added: 37/ "...[S]uch public confessions of personal sin has revealed few sinners." Finally, the general stricture must be remembered that: 38/

It is generally agreed that trade union democracy cannot be achieved by government fiat. Model union constitutions have not always prevented despotic rule by union officers and there is little reason to hope that statutory requirements could not similarly be subverted. ...Legislation intended to bring about greater union democracy will be successful, therefore, primarily to the extent that it has the effect of inducing unions themselves to establish fair admission policies and to provide reasonable protection of the civil liberties of individual members.

REFERENCES

- 1/ Syndicat Catholique des Employés de Magasins de Québec Inc. v. Compagnie Pâquet Ltée., 18 D.L.R. (2d) 346 (Can. S.C. 1959); rev'ng [1958] Que. Q.B. 275, per Judson J. at pp. 353-354. For a comment on this case, see Hurtubise, Note, 39 Can. Bar Rev. 285 (1960). Cf. Ry. Employees' Dept., A.F.L. v. Hanson, 351 U.S. 225 (1956).
- 2/ This point has been made tellingly by Professor Summers, in Internal Relations Between Trade Unions and Their Members, 91 Lab. Rev. 175, at 176 (1965): "The scope of the union's control and the tightness with which it binds the individual differ between the various countries, but in every one which has had a trade union movement worthy of the name decisions made by the union can affect the members as immediately and conclusively as decisions by government itself. Wages negotiated by the union may be more important to the member than taxes levied by the government. Denial of a pension brings equal hardship to the individual whether it is by a union official or a state agency. In a democracy the exercise by any group of such power over individuals raises pressing questions as to the rights of members within the organization."
- 3/ Harris v. Geier, 164 Atl. 50 (N.J. Ch. 1932), per Buchanan, V.C., at 53.
- 4/ See, e.g., an editorial in the Globe & Mail (Toronto), Aug. 2, 1963, p.6, whose burden is that an employer's refusal to include a union security provision in a proposed collective agreement is a matter of "basic principle" and, as such, should not be the subject of the usual machinery of settlement in such disputes. One would have thought that if such provisions are "matters of the basic principle" the proper opponents of their validity should be the public in general or the workers affected, both of whom through legislation and selection of a union as their bargaining agent have impliedly accepted such provisions, rather than employers who would gain by their deletion.
- 5/ See Lenhoff, The Problem of Compulsory Unionism, 5 Am. J. Comp. L. 18 (1956).
- 6/ See, e.g., Clawson, Union Security Clauses and the Right to Work, 30 Can. Bar Rev. 137, at 141 et seq. (1952).
- 7/ For examples of general opposition to various forms of union security, see Campaigne, Check-off: Labor Bosses and Working Men (1961); Court, The Problems of Union Power (1961); and Sir A.T. Denning L.J. A British View of "Right-to-Work" Laws, U.S. News & World Report, 16 Sept. 55, at 142.
- 8/ Can. Ind. Lab. Assns. and Unions, Submission to the Select Committee on Labour Relations (Ont. Govt. 1957), at 9.

- 9/ "I say...that the case for union security is based on social doctrine... on the recognition that an employee tends to lose his individuality because of the bigness of industry in our complex social economic system. He faces no danger of losing his freedom of action because of the union. On the contrary he joins a union to participate more fully and with greater security in his industrial milieu." Cutler, Legality of the "Rand Formula" and the Union Shop in the Province of Quebec, 17 Rev. du Barr. 226, at 227 (1957).
- 10/ See, on this point, Schlesinger, Market Realism versus Logical Absolutes in Labor Reform, 48 Va. L. Rev. 58, at 61 (1962).
- 11/ See Hanslowe, Labor Law and the Public Interest, 11 J. Pub. Law 27, at 44 et seq. (1962).
- 12/ For a discussion on this point, see Macdonnell, Freedom of Occupational Association and Human Rights, 26 Can. Bar Rev. 683, at 693 (1948).
- 13/ See Freidin, The Public Interest in Labor Dispute Settlement, 12 Law & Cont. Probs. 367, at 383-385 (1947). See also Ont. Fed. of Labour, Submission to the Select Committee on Labour Relations, (Ont. Govt. 1957), at 15: "There remain, however, a small number of employers who refuse as a matter of policy to make dues deductions for their employees under any circumstances. In such areas we also find a stubborn reluctance of the employers to accept unions as a permanent institution, and a tendency to try and get rid of unions whenever the opportunity appears." For an example of the opposite position, see the Bd. of Trade of Metro. Toronto, Submission to the Prime Minister of Ont. regarding Amendments to the Labour Relations Act, Jan. 19, 1960.
- 14/ This point is made most clearly by Professor Kahn-Freund when he says that one of the chief characteristics of the labour movement is "its aversion to legislative intervention, its disinclination to rely on legal sanction, its almost passionate belief in the autonomy of industrial forces." In Law and Public Opinion in the Twentieth Century (1959), at 224. Also see, passim, Graveson, The Status of Trade Unions, 7 J. Pub. Teachers of Law 121; and Macdonnell, supra ref. 12, where he reproduces various statements made by trade unionists on this point.
- 15/ For an excellent discussion of the development of this area of law, see Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1930).
- 16/ See legislation in Appendix B.
- 17/ See the provisions of the Landrum-Griffin Act (the Labor-Management Reporting and Disclosure Act), 29 U.S.C., § 401-531 (1964), reproduced in Appendix J. The relevant Canadian legislation includes Part II of the Corporations and Labour Unions Returns Act, Stats. Can. 1962, c.26; Maritime Transportation Unions Trustees Act, Stats. Can. 1963, c.17.
- 18/ On this point, see Witmer, Civil Liberties and the Trade Union, 50 Yale L.J. 621, at 628 (1941).

- 19/ Summers, Legal Limitations on Union Discipline, 62 Harv. L. Rev. 1049, at 1101 (1951).
- 20/ Madden v. Atkins, 151 N.E. 2d 73, at 78 (N.Y. 1958).
- 21/ DeMille v. American Federation of Radio Artists, 187 P. 2d 769, at 776 (Cal. 1947).
- 22/ Cox, Law and the National Labor Policy (1960), at 94.
- 23/ Allen, Power in Trade Unions (1954), at 15.
- 24/ Magrath, Democracy in Overalls: The Futile Quest for Union Democracy, 12 Ind. & Lab. Rel. Rev. 503, at 524 (1959), contains a summary and criticism of all the major articles in this field.
- 25/ E.g., the S.I.U. imbroglio: see Report of the Industrial Inquiry Commission Concerning Matters Relating to the Disruption of Shipping on the Great Lakes, the St. Lawrence River System and Connecting Waters (1963). This is the famed "Norris Report".
- 26/ Even in Russia a similar phenomenon occurs: see Brown, The Local Union in Soviet Industry: Its Relations with Members, Party and Management, 13 Ind. & Lab. Rel. Rev. 192 (1960).
- 27/ One author has wryly commented that the union, engaged in economic warfare, cannot stop to "ballot before each bullet". Christensen, Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy, 43 N.Y. U. Law Rev. 227, at 228 (1968).
- 28/ For a statement as to the similarity of individual to group interests in trade unions, see Smythe, Individual and Group Interests in Collective Labor Relations, 13 Lab. L.J. 439 esp. at 445 (1962). The opposite view is set out in McConnell, Factionalism and Union Democracy, 9 Lab. L.J. 635 (1958).
- 29/ One must, of course, have some consideration of the view presented by some that the need for unions, except as bargaining units, is gone. There no longer is any battle or jihad (holy war) with management. If this is so, the "ends" of unionism become less important and the "means" need greater emphasis.
- 30/ This point is made in Bernhardt, The Right to a Job, 30 Corn. L.Q. 292, at 313 et seq (1945).
- 31/ See Magrath, supra ref. 24.
- 32/ Royal Commission on Trade Unions and Employers' Associations, (Cmd. 3623, 1968), paras. 587-669.
- 33/ "A trade union is a political agency operating in an economic environment." Quoted in Barbash, American Unions, Structure, Government and Politics (1967), p. 136.

- 34/ As in Australia for example: see, Merrifield, Regulation of Union Elections in Australia, 10 Ind. & Lab. Rel. Rev. 252 (1957).
- 35/ See on this point Blumrosen, Union-Management Agreements which Harm Others, 10 J. Pub. Law 345, at 347 (1961); and Howlett, Contract Rights of Individual Employees as Against the Employers, 8 Lab. L.J. 318 (1957).
- 36/ Summers, American Legislation for Union Democracy, 25 Mod. L. Rev. 273, at 296 (1962).
- 37/ Ibid, at 297.
- 38/ Aaron and Komaroff, Statutory Regulation of Internal Union Affairs, 44 Ill. L. Rev. 425, 631, at 635 (1949); see also on this point Graveson, The Status of Trade Unions, 7 J. Soc. Pub. Teachers of Law 121, at 124 (1963). In fact, this structure has been borne out by history, for certain authorities feel that there has been little substantive amendment in Union Constitutions in response to the Provisions of the Landrum-Griffin Act (1959). Rose and Taft, The Effect of the L.M.D.R.A. Upon Union Constitutions, 43 N.Y. U. Law Rev. 305 (1968).

CHAPTER II

THE PROBLEM OF UNION SECURITY

In the twenty-one years that have elapsed since the publication of the "Rand Formula" 1/ in 1946, union security legislation has been enacted in almost every province in Canada 2/, its existence 3/ and validity 4/ having become accepted as an acknowledged part of the Canadian labour scene. In short, for a vast number of workers in Canada union membership has become a sine qua non of continued employment. Consequently, a study of this area of the law is an integral part of any examination of decision making by members of labour unions.

EXISTING CANADIAN UNION SECURITY LEGISLATION 5/

Compulsory Union Membership

Most Canadian labour legislation contains provisions that permit the parties to a collective agreement to negotiate a union security clause making continued employment conditional on maintenance of union membership. Section 6(1) of the federal Industrial Relations and Disputes Investigation Act (I.R.D.I.A.) provides the usual wording:

6. (1) Nothing in this Act prohibits the parties to a collective agreement from inserting in the collective agreement a provision requiring, as a condition of employment, membership in a specified trade union, or granting a preference of employment to members of a specified trade union.

Similar legislation can be found in the labour relations acts of Alberta (s. 80 (2)), British Columbia (s. 8), Manitoba (s. 6 (2)), New Brunswick (s. 5 (1)), Newfoundland (s. 5 (1)), Nova Scotia (s. 6 (1)), and Ontario (s. 35 (1) (a)). Only in Quebec can no such provision be found.

To the extent that this places an extremely wide power over a person's employment in the hands of the union, most legislation attempts to limit the exercise of these clauses. Thus, to protect the choice of bargaining representatives by workers, s. 6 (2) of the federal Act prevents the use of such clauses for loss of union membership as a result of dual-unionism:

6. (2) No provision in a collective agreement requiring an employer to discharge an employee because such employee is or continues to be a member of, or engages in activities on behalf of a union other than a specified trade union, is valid.

See also the Manitoba (s. 6 (3)), New Brunswick (s. 5 (2)), Newfoundland (s. 5 (2)), Nova Scotia (s. 6 (2)), and Prince Edward Island Acts. Ontario (s. 35 (2-4)) has a longer and more intricate provision but its intention is the same and Saskatchewan (s. 32 (4)) uses slightly different language again.

A further restriction on the use of union security clauses is found in Ontario (s. 35 (2)) where a person cannot be discharged by virtue of such clause where he has "...engaged in activity against the [incumbent]...or on behalf of another trade union." Again, Prince Edward Island allows an employer to refuse to enforce a union security clause where he "has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members [or]...was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership". [See also Saskatchewan, s. 32 (3)]. Finally, Newfoundland (s. 5 A) permits an employer to refuse to enforce a union security clause where the employee involved has been refused membership in the union.

Only in Saskatchewan is a form of union security clause made mandatory (s. 32 (1)). There, when a union represents the majority of workers, such union may require the company involved to require as a condition of employment compliance with the following provision:

Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;....

Check-off Legislation

Although there is no legislation on this point in the federal, New Brunswick or Manitoba Acts, most provinces have provisions to govern this aspect of union security. Thus, the Alberta (s. 101), British Columbia (s. 9), Newfoundland (s. 6), Nova Scotia (s. 67), Quebec (s. 38), and Saskatchewan (s. 25) Acts permit the parties to negotiate clauses making compulsory the employer's compliance with voluntary check-offs. Ontario (s. 35), however, permits similar provisions for compulsory check-offs, while Prince Edward Island (s. 48) places no adjective before "check-off".

JUDICIAL ENFORCEMENT OF UNION SECURITY CLAUSES

In dealing with these legislative and collective agreement provisions, courts and labour relations and arbitration boards have in most cases interpreted them narrowly in favour of the individual member, thus providing further safeguards for the individual worker. In those sections dealing with compulsory union membership, this tendency has been shown most clearly. For example, when faced with the statement in an earlier case that a union has a legal right in some circumstances to demand the discharge by a company

of expelled members 6/ a court refused to grant a mandatory injunction to enforce this right. 7/ Again, in the Ocean View Development case 8/, where a collective agreement stated that an employee had the "option" of joining the union or paying dues, the court held that the company did not have to fire employees who did neither as such choice was not a "condition of employment". However, in a similar case where this phrase was added, together with an admonition that any person who failed to do so should "be subject to discharge" 9/, the court held that "subject to discharge" merely meant "prone, open or exposed" to discharge and that, therefore, the company did not have to discharge employees expelled from membership by the union. Labour arbitration boards have used similar reasoning, stressing that discharging employees was a question of management rights. 10/ And even labour relation boards, when dealing with companies' refusals to fire as an unfair labour practice, have held that such provisions are "penal" in nature and, therefore, should be interpreted strictly, that is, in favour of the individual worker. 11/

A separate and opposed line of authority does exist whereby courts have interpreted these provisions free of any canon of construction favouring the individual. 12/ Similarly, many arbitration boards have given the obvious meaning to membership clauses that their breach entails an obligation on the part of the company to discharge the employee in question. 13/ Where a collective agreement contains such a membership provision 14/, and the board is willing to accept this latter view, there are still some limitations placed on companies' duties in these cases. 15/ It has been held that an expulsion, to trigger the union security clause effectively, must conform both to the union constitution and by-laws and to the provisions in the collective agreement. Thus, the union must, when asking

for the discharge, at least present the company with a copy of the union constitution, related documents, and the reason for the expulsion. 16/ If the company does not require the union to do so in order that it may satisfy itself as to the legality of the expulsion as shown on the face of these documents, it is left open to prosecution for an unfair labour practice or to an adverse arbitration award when it subsequently discharges the employee, even if it acted in good faith. 17/

Indeed, in only one case 18/ was the attitude above not noted. In that case a very narrow view of s. 35 (2) of the Ontario Act was taken: holding that activity by a union member "against" its executive, but in favour of a reform slate of candidates, was not activity "against" the union but rather "for" it. This case seems palpably "bad law" and so of little account.

When dealing with check-off provisions, probably because they do not entail loss of employment to the same extent as membership clauses, judicial and quasi-judicial bodies have not been as reluctant to give a wide reading to the legislative and negotiated provisions with which they have been faced. 19/ For example, if the agreement says the check-off is irrevocable 20/, arbitration boards have demanded strict adherence to any provision permitting employees to withdraw their authorization for such check-off. 21/ In total, however, the cases, even in those relating to check-off disputes, still seem to indicate a predisposition on the part of the courts to accept interpretations favourable to the individual worker. Thus, the courts exhibit a tendency to limit the use of union security provisions; but this provides scant protection when there is, as has been pointed out, little control over the substance of the provisions themselves.

EXTENT OF UNION SECURITY PROVISIONS IN CANADA

It is very difficult to discover the exact extent to which various forms of union security provisions are agreed to by the parties to collective agreements in Canada, for not only are statistics in this area very unreliable 22/, but also such statistics as do exist were compiled in relation to sectors of industry rather than as a whole. These figures are shown in Tables III, IV and V on the next pages.

Aside from a very detailed examination of these figures, it is obvious that at that time 66 per cent of workers covered by the study were subjected to some form of clause requiring membership in a union and 96 per cent to a check-off provision. The experience of the writer is that such clauses are now even more prevalent. The significance of this fact will be examined later in this chapter when proposals are made for changes in the law.

UNION SECURITY IN OTHER COUNTRIES

Great Britain

Generally speaking, union security is not an issue in Great Britain. Basically, this is because the objective of the union movement is to have 100 per cent union membership, not membership in any specific union. 24/ Thus, hostility to the North American form of union security 25/ exists, some types even being outlawed by legislation. 26/ It should also be noted that collective agreements are unenforceable in England. 27/ Enforcement of such provisions as might exist is by traditional forms of union pressure.

Consequently, it would seem that British experience would be irrelevant to this study. It is interesting to note, however, that it is not uncommon

TABLE III

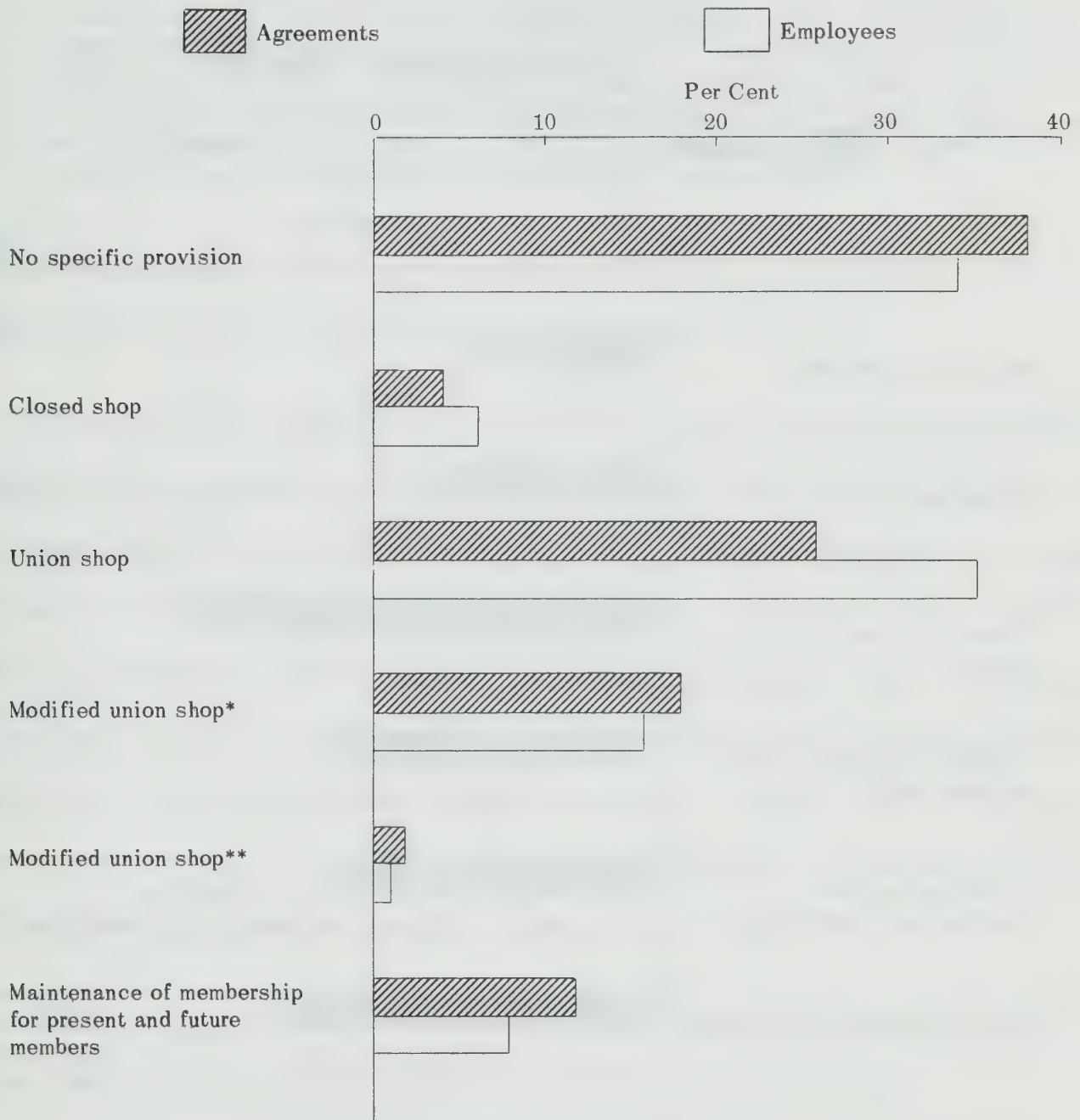
UNION SECURITY
IN CANADIAN MANUFACTURING INDUSTRY, 1967

Provision	Agreements		Employees Covered	
	No.	(%)	No.	(%)
MEMBERSHIP				
No specific provision.....	36	(38)	83,970	(34)
Closed shop.....	4	(4)	14,500	(6)
Union shop.....	24	(26)	87,400	(35)
Modified union shop (compulsory membership for new employees, with maintenance of membership for others).....	17	(18)	39,000	(16)
Modified union shop (compulsory membership for new employees, with no mention of maintenance for others).....	2	(2)	2,200	(1)
Maintenance of membership for present and future members.....	11	(12)	22,050	(8)
CHECK-OFF				
No specific provision.....	8	(9)	10,200	(4)
Voluntary, irrevocable.....	8	(9)	13,590	(5)
Voluntary, irrevocable, with escape clause.....	20	(21)	42,910	(17)
Compulsory for all employees in closed or union shop..	13	(14)	46,350	(19)
Compulsory for all employees in modified union shop..	13	(14)	59,350	(24)
Compulsory for all employees in open shop.....	15	(16)	27,920	(11)
Other*.....	17	(17)	48,800	(20)
PREFERENTIAL HIRING – RE-HIRING				
No specific provision.....	78	(83)	215,900	(87)
Some form of preferential hiring or re-hiring.....	16	(17)	33,220	(13)

* Includes other forms of compulsory check-off.

TABLE IV

UNION SECURITY – MEMBERSHIP



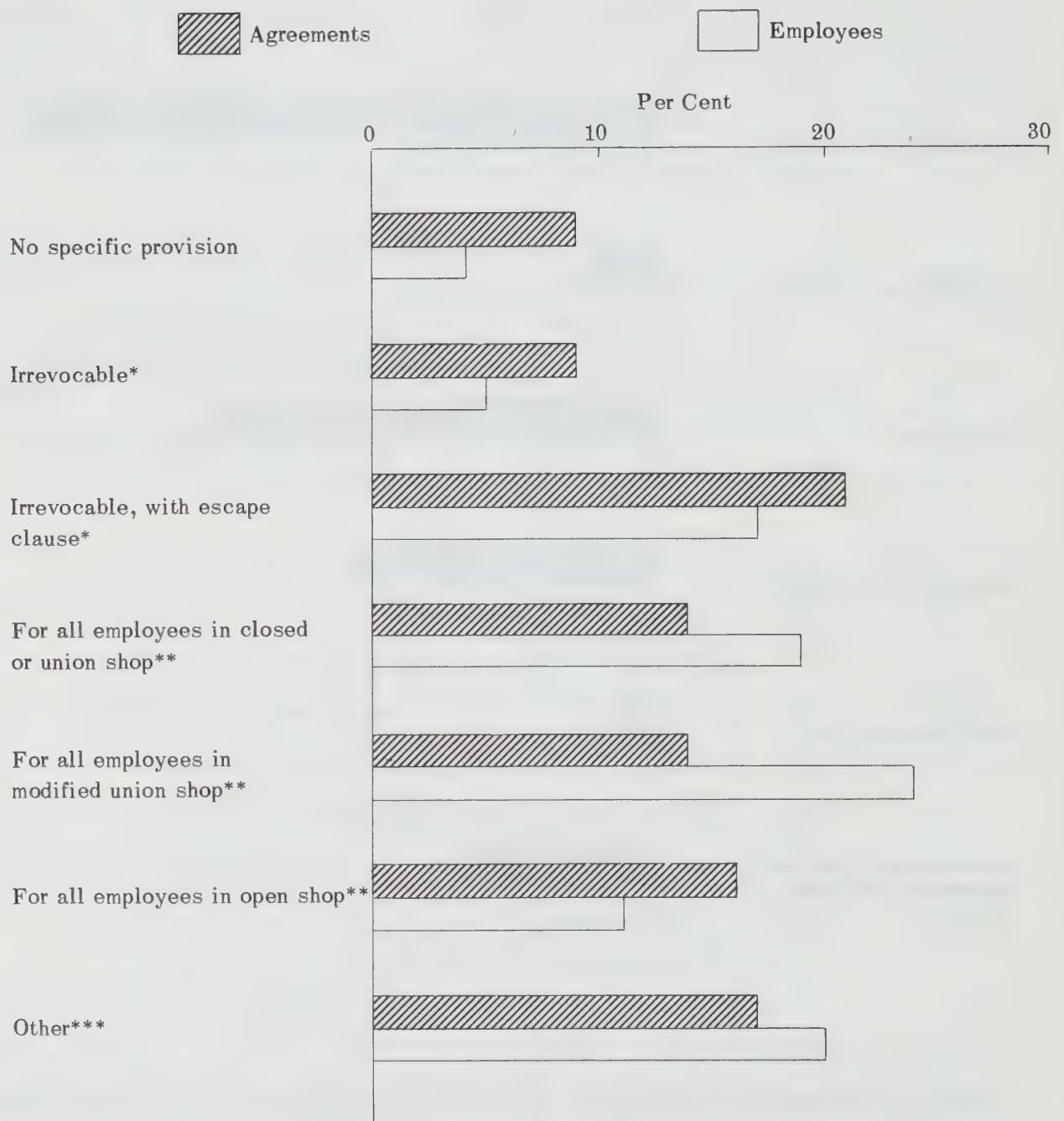
Note: * Compulsory membership for new employees, with maintenance of membership for others.

** Compulsory membership for new employees, with no mention of maintenance for others.

Source: Table 3.

TABLE V

UNION SECURITY - CHECK-OFF



Note: * Voluntary.

** Compulsory

*** Includes other forms of compulsory check-off.

Source: Table 3,

to find employers there demanding union membership of all its employees. 28/

The reason for the English position was stated by Professor Roberts: 29/

...Indeed, the most powerful argument against [North American] compulsory unionism is that it removes the last important safeguard of the member, the right to drop out when he feels like it. Experience in America and elsewhere has shown that compulsory unionism is a potent factor in the decay of union democracy; its effects are insidious and difficult to combat.

This attitude should bear on the choices made by the Task Force in this area and will be referred to later.

Of some importance is the recently released Report of the Royal Commission on Trade Unions and Employers' Associations 1965-68. 30/ The level of Trade unionism in England as a percentage of the working force is merely 46 per cent comparable to that in North America. Of this figure, 13.8 per cent is composed of what is called a "post-entry" closed shop, or what we might call a "union" shop, and 4 per cent of the figure is made up of a "pre-entry" type of shop which approximates our "closed" shop. The figure of 40 per cent of closed-union type shops in relation to the total number of employees is close to that of 41 per cent in Canada.

Based on percentage figures, similar to ours, the Report recommended that the "closed" shop (the English sense) be retained: 31/

1065. The possibility of prohibiting the closed shop is rejected. It is better to recognize that under proper safeguards a closed shop can serve a useful purpose and to devise means of overcoming the disadvantages which accompany it.

To supplement this there would be established an appeal procedure through the executive committee to an "independent review body". 32/ Throughout the review of the law surrounding an individual's relation to his union is

the premise that the arguments for "closed" shops bear the greatest weight, and that there "...is little evidence that applications for membership are dealt with unfairly, or that membership is capriciously refused". 33/ The Commission in its Report nowhere evidences the great fear held in the United States and Canada that "closed" shops are "bad" because they restrict the so-called "right-to-work" and that admission practices are arbitrary and unjust. 34/

Australia

In this country the present legislation is extremely favourable to all forms of union security from the point of view of unions. Nothing from this legislation is worthy of comment as it is almost devoid of protection for individuals and, as such, is unpalatable in the Canadian context. It is interesting to see, however, that this legislation was very late in coming in a country where a Labour party has held political power for many years. 35/

United States

Nothing need be said about the position in this country. Generally, the philosophy and legislation is much the same as in Canada. 36/ The only major difference lies in the arguments concerning the federal statute that permits states to enact "right-to-work" legislation and its various constitutional ramifications. 37/ This controversy is not relevant in the Canadian context; the philosophical, political and economic arguments which surround the concept of union security will be dealt with below.

Europe

Union security is not an issue in Europe. There freedom to abstain from joining a union is common 38/, union security being held to be outside

the area of legitimate union bargaining and collective agreements only binding members. 39/ As Professor Lenhoff has stated: 40/ "...the principle of voluntarism has permeated the development of labor unions on the Continent and compulsory unionism has been entirely inconsistent with public opinion there". This approach requires European unions to attract members by way of the advantages the union's bargaining power has rather than using this power to force membership. 41/

THE ARGUMENTS FOR AND AGAINST UNION SECURITY

Theoretically, the arguments concerning the desirability of union security place certain assumptions about political and economic life in direct opposition. In short, the individualistic philosophies of the 19th century come into conflict with the collectivist necessities of the present day. 42/ Thus antagonists of union security stress the traditional laissez-faire economic position for support. Persons skeptical of compulsory membership in any form and those holding a strong and illogical respect for what they consider "democracy" join together with traditionalists to push ethical and moral arguments which, in their most commonplace form, are revealed in the argument that the law should not compel membership where the union cannot persuade. 43/ Further, these men take exception to a system that in their view, permits a union to tax non-members. 44/

The protagonists of compulsory unionism generally proceed on the basis of what is required to permit the proper functioning of a post-Keynesian economy. 45/ Thus, an orderly functioning of collective bargaining becomes an almost inevitable concomitant of this position and the unity of labour a desirable objective. 46/ The arguments relating to individual freedom are answered by an a contrario argument that: 47/

[T]he case for union security is based on social doctrine. ...on the recognition that an employee tends to lose his individuality, because of the bigness of industry in our complex social economic system. He faces no danger of losing his freedom of action because of the union. On the contrary, he joins a union to participate more fully and with greater security in his industrial milieu.

Again, the point is made that in our highly-organized society, freedom implies some limitations of rights.^{48/} The "right-to-tax" argument is answered on a crude level by use of the term "free rider" and on a more sophisticated level by the argument that labour legislation provides for a "collective goal" (i.e., bargaining and, hopefully, collective agreements) for which "collective good" all persons who benefit should pay.^{49/} This, obviously, has certain flaws (e.g., membership costs may cover more than representational expenses), but this point will be returned to later.

Aside from the arguments commented upon above (which I believe give an edge to the latter position), practical considerations dictate a continuation of union security in some form. At this level, the opponents of union security have argued that its existence is a cause of strikes and other labour disturbances^{50/} and also that it forces management to fire employees who are otherwise able workers merely because they do not have union membership.^{51/} As to the first point, it has been stated that "right-to-work" legislation had a similar effect^{52/}, but statistics indicate that the incidence of labour disputes is not affected by the existence or non-existence of union security legislation.^{53/} The second argument is, in one way, unanswerable but its effect can be ameliorated by properly drafted legislation and the residue placed against the points yet to be discussed. Again, arguments concerning the ulterior motives of proponents of these two positions cancel each other out: on the one hand the claim that the object of union security

is to facilitate unions in exploiting workers and eventually "to take over government and make government subservient to the will of a few powerful union leaders" 54/ is countered by the suspicion that all moves to alter the present position are fronts for anti-union activity. 55/

The remaining practical considerations all seem to favour retention of some form of union security. First, it is claimed that union security protects against the secondary attacks of management after certification and thus facilitates better collective bargaining relationships. 56/ Secondly, it appears that unions can obtain a form of "union security" in an indirect manner, e.g., by use of seniority provisions. 57/ The final, and perhaps conclusive argument, is that even absent legislation the parties to collective agreements have achieved forms of union security. 58/ Hence, it seems undesirable to debate this issue further and rather settle in on ways of perfecting existing legislation. In this respect it might be well to remember Lenhoff's comment about the legal nature of union security: "Ah, but that's not law; it's politics". 59/

CONCLUSIONS

The principal valid objections to union security relate to its operation rather than the theory behind it. Consequently, these abuses can be lessened, if not eliminated. The conclusions to this chapter, therefore, will deal with these points separately on the assumption that the Task Force is not going to eliminate legislation or enact prohibitory legislation in this area as has been suggested elsewhere. 60/

1. Union security legislation assists in maintaining incumbent union executives contrary to democratic principles. 61/ This charge, if true,

constitutes a real vice. Its solution, however, lies more properly in the field of admissions to union, the right to vote and the nature of union meetings. Hence, its solution will be found there.

2. Legislation to ensure fair entrance to union membership where union security exists can easily be avoided by various methods. The first such method is by high initiation fees or periodic payment of unreasonable dues.^{62/} The obvious way out of this problem is either limits on fees or a legislative provision that such fees be "reasonable", with the determination of reasonableness being vested in a labour relations board. The first of these alternatives is obviously impractical: the second has substance and is recommended.

The second means is by control of hiring halls to avoid fair treatment of members. ^{63/} Here the problem has been dealt with in Canada by the courts ^{64/}, but such an approach is rather too expensive to handle all disputes. Although the writer has no idea of the scope of this problem, if it is an issue, the suggestion that government dispatchers be used has been put forward ^{65/} and seems palatable.

A third way is by use of the seniority provisions in order to frustrate new members. ^{66/} This fear does not seem to be substantiated and it is doubtful if any specific provision need be made for it.

A final difficulty lies in the fact that much of the legislation which attempts to protect the individual from abuses of a union security clause do not prevent the employer from voluntarily agreeing with a union to fire that man. ^{67/} Clearly, in the formulation of legislation this tactic must be taken into account.

3. The existence of union security is dependent on bargaining between employer and union and ignores the wishes of employees. This argument continually arises in labour relations. It is claimed that it is immoral and undemocratic to permit union security to become a counter-offer to a five cent an hour raise by a union fearful of a temporary disillusion of newly-certified workers and the prospect of inroads by a rival union. 68/ In many cases this does reflect the real situation and, in any event, it seems unrealistic to have management put in the position of defending employees against their union. As a result, three solutions have been proposed for this problem.

The first suggestion is evidenced by s. 32(1) of the Saskatchewan Act, whose basis is to make some form of union security mandatory upon the union having proof of a certain percentage of membership in the bargaining unit. The difficulty with this is obviously that the representation campaign may not indicate views on union security.

The second is that negotiated union security clauses only be binding when affirmed by a vote of the bargaining unit. 69/ Such provisions were once used in the United States, their results showing strong employee support for union security. 70/ The difficulty with such provisions is that they may result in a change in the union-company bargain, they permit the employer to drive a wedge between the union and its members, and they cause problems with intervening unions. 71/

The third is that Rand Formula situations be limited in such a way that non-member employees only pay a fee for representational expenses. 72/ The advantages of such a system would be that it eliminates moral issues and "free riders" and permits a union to expel members and turn them into

something other than such a "free rider" or a man on the street. 73/ In some ways this is very much the European position.

It is a variant to the third suggestion that the writer finds most helpful. Specifically, it is suggested that in no case should a person be required to pay more than his "bargaining fee" on pain of loss of employment. Such a position flows from the certification order and so no question of democratic rights is involved. Further, it lessens the difficulties of public intervention in the private affairs of a union. It should be provided as well that such a clause be mandatory upon certification (similar, in some ways, to the Saskatchewan provision). This latter step removes the issue from the bargaining table and relieves the employer of the obligation of furthering the interests of the worker. This, it is hoped, would put to rest as a bargaining issue a matter which has created far more heat than light and bedevilled much of industrial jurisprudence. 74/

REFERENCES

- 1/ Re Ford Motor Co. of Can. and U.A.W., C.C.H. Lab. Law Transfer Binder (1949-54), p. 18,001; 46 Lab. Gaz. 123 (1946). See also Clawson, The Rand Formula: Subsidiary and Quasi-Legal Aspects, 24 Can. Bar Rev. 879 (1946); Cutler, Legality of the "Rand Formula" and the Union Shop in the Province of Quebec, 17 Rev. du Barr. 226 (1957); and Spector, The Rand Formula: A Milestone in Trade Union Security, 6 Rev. du Barr. 458 (1946). For a criticism of this formula see Re Canada Packers and Burns & Co., 1 Lab. Arb. Cas. 57, at 59 (1947).
- 2/ Most Canadian legislation now permits some form of closed shop provision to be put in a collective agreement. See this legislation collected in Appendix A and the discussion infra.
- 3/ See List, Globe and Mail (Toronto), 5 July 63, p. B-3, where this point is discussed.
- 4/ See, e.g., Syndicat Catholique des Employés de Magasins de Quebec, Inc. v. Compagnie Pâquet Ltée, 18 D.L.R. (2d) 346 (Can. S.C. 1959); rev'ng [1958] Que. Q.B. 275. For comments on this case, see Hurtubise, Note, 39 Can. Bar Rev. 285 (1960), and Cutler, supra, ref. 1.
- 5/ For the exact wording of all such legislation, see Appendix A.
- 6/ Wilson, J., in Jurak v. Cunningham (No.3), 21 D.L.R. (2d) 58 (B.C.S.C. 1959).
- 7/ McLaughlin v. Westward Shipping, 21 D.L.R. (2d) 770 (B.C.S.C. 1959). It would, however, grant a negative injunction to prevent the company from hiring non-union labour.
- 8/ Bldg. and General Labourers' Union, Loc. No. 602 v. Ocean View Development Co., [1955] 5 D.L.R. 12 (B.C.S.C.).
- 9/ Michael v. Parkinson Bldg. Supplies, 38 W.W.R. (n.s.) 563 (B.C. Cnty. Ct. 1962).
- 10/ See, e.g., Re Brading's Brewery, 6 Lab. Arb. Cas. 341 (1956); see, especially, the dissent.
- 11/ See, e.g., Re Early Seed & Feed, 2 C.L.S. 85-1021 (Sask. L.R.B. 1950).
- 12/ See, e.g., Rex ex rel. Bender v. Piggott, 89 Can. C.C. 360 (Sask. Pol. Ct. 1947); and Corbett v. Can. Nat. Printing Trades Union, [1943] 4 D.L.R. 441 (Alta. C.A.); rev'ng [1942] 2 D.L.R. 762 (Alta. S.C.).
- 13/ The leading award on this point is Re Northern Mines Press, 8 Lab. Arb. Cas. 251 (1958). See also, for an example of this liberal method of interpretation, Re New Toronto Brass, 1 Lab. Arb. Cas. 100 (1947).

- 14/ It seems clear that in the absence of such a provision a company need not discharge an employee: Re Joy Mfg. Co., 6 Lab. Arb. Cas. 149 (1955).
- 15/ For a résumé of the position in the U.S., where this area has been the subject of wider analysis, see Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1099-1100 (1951).
- 16/ Re Orenda Engines, 8 Lab. Arb. Cas. 116 (1958).
- 17/ Re Franklin Mfg. Co., 12 Lab. Arb. Cas. 327 (1962).
- 18/ Re McAnally Freightways, OLRB Mon. Rep., Apr. 64, p. 23.
- 19/ E.g., Re Charlton Transport, 13 Lab. Arb. Cas. 59 (1962), (extends obligation of company to check-off two periods when members sick or laid off); Re City of Peterborough, 10 Lab. Arb. Cas. 328 (1960), (extends to person hired by municipality for winter works programme but paid by federal government's moneys). Cf. Reg. v. L.R.B. Sask., ex p. Army & Navy Dept. Store, 34 D.L.R. (2d) 149 (Sask. C.A. 1962).
- 20/ Unless the collective agreement says the check-off is irrevocable, employees may revoke their authorization at any time: Re H.E.P.C. of Ont., 11 Lab. Arb. Cas. 310 (1961).
- 21/ See, e.g., Re Timken Roller Bearing Co., 10 Lab. Arb. Cas. 3 (1959); Re Sperry Gyroscope, 8 Lab. Arb. Cas. 215 (1957). Cf. McKinnon v. Dom. Coal Co., 5 D.L.R. (2d) 481 (N.S. S.C. 1956); aff'd sub nom. U.M.W. of A., Dist. 26 v. McKinnon, 8 D.L.R. (2d) 217 (N.S. C.A. 1957); and 12 D.L.R. (2d) 449 (Can. S.C. 1958); and see Re Goodyear Tire & Rubber Co. of Can., 1 Lab. Arb. Cas. 13 (1947).
- 22/ See on this point Dempsey, The Right-to-Work Controversy, 16 Lab. L.J. 387 (1965).
- 23/ These charts are taken from Canada Department of Labour, Forty-two Provisions in Major Collective Agreements (1967), pp. 10, 4 and 5, respectively. See also Dudra, Union Security in Canada, 12 Lab. L.J. 585, at 591 (1961).
- 24/ See on this point McKelvey, The Closed Shop Controversy in Postwar Britain, 7 Ind. & Lab. Rel. Rev. 550, at 551 (1954).
- 25/ See, e.g., Sir A. T. Denning (L.J.), "A British View of 'Right-to-Work' Laws", U.S. News & World Report, 16 Sept. 55, p. 142. In England, a closed shop demands only membership in a union, not in a particular union.
- 26/ See McKelvey, supra, ref. 24, at 555. Also The Trade Disputes and Trade Unions Act, 1927, 17 & 18 Geo. V, c. 22.
- 27/ Cf. Reynolds v. Shipping Federation, [1924] 1 Ch. 28, at 29. However, this most probably will change if the Donovan Report, infra, ref. 30, is implemented; see paras. 1053-1055.

- 28/ See Roberts, Trade Unions in a Free Society (2d ed. 1962), at 85-86; and McKelvey, supra, ref. 24, at 553.
- 29/ Ibid., at 86. British experience has lead Frankfurter, J., to similar conclusions. See these quoted in Brown, State Protection of the Right to Work, 4 Lab. L.J. 31 (1953).
- 30/ Cmnd. 3623, 1968; hereinafter referred to as the Donovan Report.
- 31/ Ibid., p. 270.
- 32/ Ibid., pp. 165-167, paras. 611 and 615.
- 33/ Ibid., p. 165, para. 610.
- 34/ Within the Report there is a failure to distinguish between what has been accepted; that is, whether both the pre-entry and post-entry types are valid, or only the latter is. Certainly there is opposition to the former type; see The Economist, 13 April 1968, p. 21.
- 35/ For a review of this position, see Martin, Legal Enforcement of Union Security in Australia, 13 Ind. & Lab. Rel. Rev. 227 (1967).
- 36/ To the extent that differences exist, they are of emphasis, e.g., a greater use of the Rand formula. For an analysis of this point, see Dudra, supra ref. 23.
- 37/ United States articles in this field are too vast to quote. A brief look at the bibliography will give some idea of this. Note the content of s. 14 (b), Taft-Hartley Act; also one should realize that the closed shop is illegal and prohibited by the same Act.
- 38/ See McDermott, Union Security and Right-to-Work Laws, 16 Lab. L.J. 667 (1965).
- 39/ See Summers, Freedom of Association and Compulsory Unionism in Sweden and the United States, 112 U. Pa. L. Rev. 647, at 658-659 (1964). Realistically, however, this affects the whole plant as an employer cannot afford to pay two wage scales.
- 40/ Lenhoff, The Problem of Compulsory Unionism, 5 Am. J. Comp. Law 18, at 18 (1956). See also I.L.O., Studies and Reports, Series A (Industrial Relations), No. 28 (Geneva, 1927).
- 41/ See ibid., at 25, and Braun, The Right to Organize and its Limits (1950), at 149. "[T]his practice (of collective bargaining) generally is a secondary instrument...[to the attainment of political power]." McDermott, supra, ref. 38 at 670.
- 42/ See, generally, McDermott, supra, ref. 38, at 668.
- 43/ See Torff, The Case for Voluntary Union Membership, 40 Ia. L. Rev. 621 (1955); cf. Leovinger, The Case Against "Anti-Union Security Legislation", 40 Ia. L. Rev. 621 (1955).

- 44/ Brown, supra, ref. 29, at 31.
- 45/ See, generally, Hanslowe, Labor Law and the Public Interest, 11 J. Pub. Law 44 (1962).
- 46/ This point is made in Dempsey, supra, ref. 22, at 388.
- 47/ Cutler, supra, ref. 1, at 227. See also Summers, supra, ref. 34, at 647: "Although commonly asserted by the organization freedom of association is not simply a collective right, vested in the organization for its benefit. Freedom of association is an individual right vested in the individual to enable him to enlarge his personal freedom."
- 48/ See Schlesinger, "Market Realism" Versus Logical Absolutes in Labor Reform, 48 Va. L. Rev. 58, at 61 (1962).
- 49/ See Pulsipher, The Union Shop: A Legitimate Form of Coercion in a Free Market Economy, 19 Ind. & Lab. Rel. Rev. 529 (1966).
- 50/ See, e.g., Can. Independent Labour Assns. and Unions, Submission to the Select Committee on Labour Relations, (Ont. Govt. 1957), at 9.
- 51/ See Summers, supra, ref. 39, at 669; and Macdonnell, Freedom of Occupational Association and Human Rights, 26 Can. Bar Ref. 683, 693 (1948): "To the trade union argument that it is unfair that individual workers should enjoy the benefit of labour agreements negotiated by the unions without subscribing to the support of the unions, the employers replied that it is infinitely more objectionable that individual workers who are giving complete satisfaction to their employers should be dismissed from their employment, and debarred from securing other employment, simply and solely because they do not choose to join a union."
- 52/ See, on this point, Warshal, "Right-to-Work", Pro and Con, 17 Lab. L.J. 131, at 137 (1966): "To conclude, right-to-work laws have not had the effects that are feared by labor leaders. On the whole, the power position of neither side has changed to an appreciable extent. The major disadvantage of these laws is that they force the union leader to be overly aggressive, thus disturbing the tranquil labor relations. It may be fair to say that the proponents of right-to-work would not spend the time and money that they do merely to support freedom of contract. They must believe that right-to-work laws will alter the power structure in union-management relations. Someone should enlighten them."
- 53/ This point is made in Gilbert, A Statistical Analysis of the Right-to-Work Law Conflict, 19 Ind. & Lab. Rel. Rev. 533 (1966). But note that the argument that a secure union contributes to stability in industrial relations would seem to controvert this, and indicate that the statistics showed only a chance correlation.
- 54/ Falque, The True Purpose of Right-to-Work Laws, 2 Cath. Law. 201, at 201 (1956); a more balanced argument is found in Fitzpatrick, The Morality of Right-to-Work Laws, 2 Cath. Law. 91 (1956). See also Morris, Mr. Fitzpatrick on the Morality of Right-to-Work Laws - Comment, 2 Cath. Law. 183 (1956).

- 55/ See, e.g., Ont. Fed. of Labour, Submission to the Select Committee on Labour Relations (Ont. Govt. 1957), at 15: "There remain, however, a small number of employers who refuse as a matter of policy to make dues deductions for their employees under any circumstances. In such areas we also find a stubborn reluctance of the employers to accept unions as a permanent institution, and a tendency to try and get rid of unions whenever the opportunity appears." See also McDermott, supra, ref. 38, at 668; and Cronin, Right-to-Work Laws, 2 Cath. Law. 186 (1956). Cf. Bd. of Trade of Metro. Toronto, Submission to the Prime Minister of Ontario Regarding Amendments to the Labour Relations Act, 19 Jan. 60.
- 56/ See McDermott, supra, ref. 38, at 671
- 57/ See Meyers, Effects of "Right-to-Work" Laws: A Study of the Texas Act, 9 Ind. & Lab. Rel. Rev. 77, at 84 (1955). Cf. McDermott, ibid., at 671, where the author points out that union security is sought to counter the fear that new employees will have of seniority and their consequent desire not to side with the union.
- 58/ See Meyers, ibid., at 84; and Warshal, supra, ref. 52 at 137. Indeed, such clauses are even found where outlawed: see The "Right" to Work—Euphemism or Constitutional Guarantee?, 50 Nw. U. L. Rev. 777, at 786-787 (1956).
- 59/ Quoted in Jaffe, Union Security: A Study of the Emergence of Law, 91 U. Pa. L. Rev. 275, at 275 (1942).
- 60/ See the comment, supra, ref. 58.
- 61/ See McDermott, supra, ref. 38, at 675.
- 62/ See Koretz et al., Symposium: Union Security Under the Taft-Hartley Act, 11 Syr. L. Rev. 37, at 40-44 (1959).
- 63/ Ibid., at 48-53.
- 64/ See Hornak v. Patterson, 58 D.L.R. (2d) 175 (B.C. C.A. 1966).
- 65/ See Maritime Hiring Halls and Labor Disputes, 1 Stan. L. Rev. 272, at 277 (1949).
- 66/ See Koretz, supra, ref. 62, at 53-55.
- 67/ See Union Security Devices and the Taft-Hartley Act, 96 U. Pa. L. Rev. 101, at 115 (1947).
- 68/ See McDermott, supra, ref. 38, at 671
- 69/ As s. 9(e) of the Taft-Hartley Act. See Morgan, The Union Shop Deauthorization Poll, 12 Ind. & Lab. Rel. Rev. 79 (1958).

- 70/ These apparently were rarely used: ibid.; but when they were they overwhelmingly supported the union: see S. Cohen, Union Shop Polls: A Solution to the Right-to-Work Issue, 12 Ind. & Lab. Rel. Rev. 252 (1959; Whitney, Union-Shop and Strike Vote Elections: A Legislative Fallacy, 2 Ind. & Lab. Rel. Rev. 247 (1949); and Hogan, The Meaning of Union Shop Elections, 2 Ind. & Lab. Rel. Rev. 319 (1949).
- 71/ See Morgan, supra, ref. 69.
- 72/ See Hopfl, The Agency Shop Question, 49 Corn. L.Q. 478, at 480 (1964).
- 73/ See Spielmans, Bargaining Fee Versus Union Shop, 10 Ind. & Lab. Rel. Rev. 609 (1957). The only obvious difficulty would be the slow growth of union membership.
- 74/ See, e.g., the impact on labour boards' determination of "qualified unions" in Chap. III, infra.

CHAPTER III

THE RIGHT TO JOIN A UNION

As can be seen from Chapter I, membership in a union is of extreme value to any person subject to collective bargaining: aside from fringe benefits available only to union members, the right to participate in collective bargaining decisions is of obvious importance. A more explicit statement on this point has been made by Professor Summers: 1/

...Denial of membership may deprive him of three valuable interests. First, it may interfere with his employment if the collective agreement had a union security provision or the union in fact enforces such a requirement. The severity of this injury depends upon the nature of the union security arrangement and its pervasiveness in the area and industry. Second, it may deprive him of various social benefits provided by the union. The importance of this depends upon the particular benefits provided and their practical availability elsewhere. Third, it bars him from any participation in the union's decisions which affect his welfare. He cannot speak at union meetings, he cannot vote in the union referendums, and he cannot be a candidate for union office. Where the union exercises substantial control the individual's rights to participate may be considered the most important interest involved.

THE COMMON LAW POSITION

Unfortunately, it has traditionally been held by the courts that at common law an employee has no legal right to belong to a trade union since this type of association was analogized to a private club. 2/ Thus, in refusing to order the admission of a worker to a union, a common law court could say, "It would be quite impractical for the courts to undertake to compel men to receive into their social relationships one who was personally disagreeable, whether for a good or bad reason." 3/ Indeed, in a recent case 4/ where a person was held to have no right to belong to a

union because, contrary to the rules of eligibility of the union, he had been guilty some twenty-four years earlier of a lesser criminal offence while still a minor, it was said: 5/

Members may legitimately, as it seems to me, narrow the classes of persons who are eligible in such manner as they may agree and as they may think most conducive to further their own personal interests as members engaged in a craft. ... It would be absurd to say that a rule as to eligibility must be reasonable in the interests of those seeking to join; they are merely one section of the public and, as such, have no locus standi in the matter, harshly though it may operate in cases such as this where the union is to some extent a closed shop.

Having regard to the size and powers of modern trade unions, such statements smack not only of unfairness, but of absurdity. 6/ Nevertheless, this principle of autonomy remains a part of the law of voluntary associations irrespective of its archaic and oppressive nature in a rapidly changing and highly organized society. 7/

Some courts, however, have recognized the necessity of putting limitations on the unfettered power of unions enunciated above. 8/ In the United States, as a consequence, it has been held that where a union tricked employees into designating them as bargaining agents and then, after negotiating a closed shop, refused these same men membership and had them expelled from their jobs, the union was guilty of an unfair labour practice. 9/ Also in New Zealand, it has been held that a union must not refuse admittance for an improper motive. 10/ In England there is also some opinion to the effect that the courts will intervene by way of declaration or injunction to compel adherence to union rules and the principles of "natural justice" in the admission of workers to unions. 11/ A more recent English case 12/ has resurrected the possibility of judicial control of admission requirements as regards reasonableness and public policy, and perhaps more important,

acclaimed the existence of a "right to admission" which imposes the necessary locus standi on a person desirous of admission, sufficient to permit the court to "prevent an arbitrary, capricious or unreasonable rejection of a qualified applicant". 13/ Again, in Switzerland and France, using a contractual argument, the right to join a union has been accepted as a condition of the monopolistic aspects of unionism. 14/ Unfortunately, in the United States, once the most fertile ground for such change, progress in this area seems, at present, to be negligible 15/, although a recent decision of the Second Circuit has tentatively resurrected the "prima facie tort" doctrine. 16/

In Canada, however, courts seem to be more aware of the incongruity of defining unions as purely private associations in an era of collective bargaining and, hence, have been more favourably inclined to assert their power in aid of applicants for admission. 17/ Thus, in Guelph v. White and Carron 18/, Coady, J. held that a former member of a union had a right to have his application heard by the appropriate committee, even though he could not force his way into the union. 19/ He also implied that the same was true of anyone who applied for membership for the first time. The strongest statements, however, were made in White v. Kuzych 20/ while the case was before the British Columbia courts. There, in the Court of Appeal, O'Halloran, J.A. stated: 21/

A man has a right to work at his trade. If membership in a Union is a condition attached to working at his trade, then he has an indefeasible right to belong to that Union. It must be so, or else the Union can have no right to agitate for a closed shop. For a Union to set itself up as the sole arbitrator of who shall join the Union and remain a member, and at the same time decree that no one shall be employed who does not belong to the Union, is an attempt to exercise totalitarian powers which no constitutional democratic country claims to have, or

has the right to confer upon any union. Such interference with individual liberty and coercion of workers may be done under a totalitarian system, but not under any system which takes its inspiration from the common law.

The Privy Council in reversing the decisions of the British Columbia courts detracted from their value as aids in controlling union admission policies, although it did not specifically refer to the above or similar statements. However, since appeals to the Privy Council have now ceased, a resurgence of similar Canadian views is possible. As has been pointed out 22/, the principle that courts should not intervene in matters of unions' admission requirements "has a stronger ring of authority than the precedents actually warrant". Thus, a strong court might be persuaded to imply, as a result of post-war legislation in Canada, both a public rather than a private status for unions and a reasonable obligation to accept for membership and fairly represent in collective bargaining all workers who apply and pay dues. 23/ It is difficult to understand the criticism that this "would place an undue burden on the judges, who would be placed in the invidious position of being forced to determine whether a rule governing admission was reasonable or not" 24/; surely the courts are continually engaged in the formulation of community standards of this kind and, further, "a union's free and autonomous control of its membership ought not to be made a fetish". 25/

Judicial attempts to lessen the rigours of the common law rule have been constrained both by the accepted union-member relationship and by the inability of the courts to discover a basis on which to support a non-member's claim to have the right to become a member. This type of dilemma has plagued the courts for some time, but has only lately become extremely important with the increased use of union security clauses.

The historical bases of "expulsion" situations have rested on the "property" or "contract" theories. 26/ "Exclusion" or more simply, "admission" cases have been constantly confused with the former situations, and as a result have fallen heir to their theoretical bases. The results, because of their inequitable effects, have been little short of disastrous 27/, for "conceptual difficulties have prevented courts from applying to the exclusion situation by the same rationales used to protect workers in expulsion cases". 28/ Little benefit could be derived from a discussion of those anomalous legal fictions.

Two other methods of approach appropriate to both categories of cases have been preferred. Both find their foundation in what might be called the decline of the judiciary's reluctance to interfere, a fact which, as has been noted earlier, is perceptible in the common law world and has had a lengthy existence on the Continent. First is the "prima facie tort" theory alluded to earlier. Its essence can be found in the following statement: 29/

Any denial of membership, when challenged, should be examined in light of the 'prima facie tort' approach. According to this theory, anyone who intentionally causes an injury to another is prima facie liable and can only defeat liability by showing justification. The adoption of the prima facie tort theory in exclusion cases would make actionable any unjustified refusal of admission. The union should be required to justify its rejection of an application and the court then examine these reasons to determine if they are consonant with a proper union objective. The application of this theory will require the union to admit all qualified and deserving applicants but will preserve to the union the power to reject an applicant when the evidence shows that rejection is in the best interests of the union and its members.

There is, of course, some confusion between this approach which emphasizes intentional infliction of injury and that which considered that

"the destruction of (the) plaintiff's union status was a tort". 30/ This latter relation of "status" to "tort" arose only in expulsion cases, since the requisite status never was obtainable in admission situations. As a result, the creation of a status tort theory in the Tunney case does not provide the comprehensive coverage that the "prima facie tort" theory does in providing solutions for both admission and expulsion problems. 31/ Of the two approaches, the former is most certainly the more suitable of the two branches of the "tort" approach.

The second method is that proposed by Rideout 32/, which is interwoven with the doctrine of the "right-to-work". He suggests that since it is difficult to extract a cause of action from this so-called constitutional right 33/, its use should be restricted to conferring: 34/

...[A] locus standi on a rejected applicant. The substance is then to be derived from the element of restraint of trade. Exclusion from any association controlling trade is clearly a restraint of trade and, if unjustified, might well be an unreasonable restraint....

The logical conclusion...is that a complete exclusion from a trade, either on arbitrary or unreasonable grounds, can be set aside by a rejected applicant.

The problem will be in defining the "right-to-work" which governs the permissibility of the exclusion. However, even the author admits of its speculative nature. 35/

The solutions presented include various adaptations of the following approaches: (i) the "government-instrumentality" approach 36/; (ii) the arbitrary or unreasonable grounds approach 37/; (iii) the extension of the National Labor Relations Board (NLRB) powers approach 38/; and (iv) the "prima facie tort" approach. To be accepted these must fulfill certain criteria: the freedom of the union to pursue its ends must be balanced

with the need to protect the worker against an "unreasonable deprivation of membership status"; it should cover both comprehensive exclusion and expulsion cases; and it should rest on a solid, juridical foundation, not on a fiction, which cannot be circumscribed by questions of jurisdiction. Each of the above proposals have their advantages, but only the "prima facie tort" doctrine meets a majority of the criteria. Quite obviously, the NLRB will be of aid in certification processes when membership requirements are discussed. Implicit in the doctrine is the idea of "justifiability" which still permits the union to impose reasonable requirements for membership. Most fortunate of all is its acknowledged existence in the common law. It is submitted that this doctrine will provide the simplicity of operation and effect that is desired. 39/ This adaptation and incorporation of a pre-existing doctrine is to be much preferred over the creation, by legislation, of some wholly new doctrine. The maintenance of the necessary balance arising from familiar principles has much to commend itself.

However, one must always keep in mind that the "prima facie tort" theory is only of value in respect of damages, but it will not gain a party admittance or a declaration ordering admittance. It may be that the latter approach would be more practical, for as one author has put it: 40/

...[a] declaration of eligibility is one step short of conferring a right to admission, but it is a step nearer to it.

DIRECT LEGISLATIVE PROTECTION

Undoubtedly, direct legislative enunciation and protection of rights to join a union is preferable to a solely common law treatment of this matter: indirect exclusionary policies of unions such as exorbitant fees,

too lengthy apprenticeships, unrealistic competency tests, nepotism, discrimination against women, and so on, would tax the ingenuity of any court.^{41/}

In Canada very little such legislation has been enacted. ^{42/} This pattern seems common to other jurisdictions as well. ^{43/} In New Zealand entrance and other fees are limited to five shillings ^{44/} and unions can only refuse membership to those of "general bad character". ^{45/} In Australia membership rules must be reasonable or the union faces loss of registration.^{46/} Generally, however, the legislation is silent or impliedly supports the common law position. ^{47/} Similar conditions of reasonability exist in some American states. ^{48/}

Such legislation as does exist in Canada is found in the various Fair Employment Practices Acts (sometimes called Human Rights Acts or Codes), of which the federal Canada Fair Employment Act is the prototype. (See Appendix B for a complete breakdown.)

Generally, such acts begin with a definition clause which indicates that "trade unions" are "persons" for the purposes of the act (Can., s. 2(i); Alta., s. 26(e); B.C., s. 2(1); Man., s. 2(1); N.B., s. 1(e); N.S., s. 2(h); Ont., s. 18(g); Que., s. 1(d) and Sask., s. 2(g)). The offense is usually set out in the following form (of the federal Act):

4. (3) No trade union shall exclude any person from full membership or expel or suspend or otherwise discriminate against any of its members or discriminate against any person in regard to his employment by any employer, because of that person's race, national origin, colour or religion.

(4) No employer or trade union shall discharge, expel or otherwise discriminate against any person because he has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Act.

Identical legislation is found in Man., s. 4(3, 4), and N.B., s. 3(3, 4). Alta., s. 7, B.C., s. 4, and Ont., s. 4(2) is to the same effect, while N.S., s. 6(3) and Sask., s. 5, are similar to s. 4(3) of the federal Act, except they include "religious creed" and "ethnic origin" in addition to the other prohibited areas of discrimination. 49/

Under the federal Act offenses may be punished by a fine of up to five hundred dollars, as does Man., s. 6, N.B., s. 8, N.S., s. 16(b), Ont. s. 14(1)(b), and Sask., s. 14(b). B.C., s.8, permits fines up to one hundred dollars and Alta., s. 18(1)(b) has a maximum of five hundred dollars for the first offense and one thousand dollars for the second. 50/

In practice, however, these provisions seem to have been little used. Letters received from the authorities responsible for the administration of these acts indicate that in only one case has resort been had to them for protection of an individual against his union. 51/ In that case (under the Ontario Act) a person alleged that he was discriminated against by his union, the United Brotherhood of Carpenters and Joiners, in a union election; conciliation services settled the matter. 52/ Hence, it is safe to say that this legislation, because it is restricted to the offense of discrimination around which there has been little litigation, lacks viability when considered in the total context of protection of admission to a union. 53/

INDIRECT LEGISLATIVE PROTECTION

In comparison with the areas discussed previously in the administration of regulatory controls over certification held by labour relations boards, a certain degree of regulation has evolved. More specifically, this control has arisen from the boards' refusal to certify any but "qualified unions".

A union "qualified" to be certified under collective bargaining statutes has been held to be one which, inter alia, may under the terms of its constitution accept for membership all workers in the unit to be certified.

The Chairman of the Ontario Labour Relations Board has given the rationale for this policy in the Gaymer & Oultram application where a craft union applied for certification of a plant in which, according to the terms of the union constitution, less than one-half of the employees could be accepted for membership: "If we were to certify the applicant on behalf of all employees in the bargaining unit which we find appropriate, we would endow the applicant with power to enter into a collective agreement with the employer requiring as a condition of employment that all employees in the bargaining unit hold membership in the applicant". 54/ Thus, fear of unbridled use of union security has given rise to this rule.

Since many unions do have, at least originally, limitations in their constitutions on the members they may accept (usually based on a craft or religious basis) 55/ there have been attempts on their part to amend these provisions in order to obtain certification. To avoid the possibility that these amendments are mere shams, boards will demand strict adherence to the constitution 56/ and evidence of sufficiently clear provisions in the union constitution to permit such change. 57/ There is also, in borderline cases, a requirement of proof of the interpretation placed on the union constitution by its members and, even where there are widely framed rules of eligibility for membership, actual discriminatory practices may preclude certification. 58/

Recently, however, the courts have indicated a proclivity to limit the protection afforded to prospective members of unions, this change coming in

the area of religious limitations and specifically relating to continued applications for certification by the Christian Labour Association of Canada (C.L.A.C.). The history of this situation stems from the Bosch & Keuning application by the C.L.A.C. in 1954 which was refused because this union limited its membership to Christians. 59/ The board buttressed its opinion by quoting sections in the Labour Relations Act 60/ and the Fair Employment Practices Act, 1951 61/, which indicate a legislative policy against unions discriminating in membership because of religion. To avoid a similar failure on the later application 62/, the union did not change its constitution, but merely had separate, unobjectionable constitutions for each of its local "affiliates" as well as an ambiguous document purporting to indicate a union interpretation of its constitution which was non-discriminatory. The latter move was an attempt by the union to bring itself within the Riddell exception 63/ whereby statements of policy on admission procedures by union officers will exclude a strict interpretation by the board of their constitutional membership requirements. The board again rejected the C.L.A.C.'s application, stating that the two constitutions should be read together, that there was no evidence that the avowed policy of the C.L.A.C. had been put into practice, that contradictory testimony existed between the Bosch & Keuning and the present hearing 64/, and that, in any event, the wording of the union policy was not clear.

In a third attempt, the Tange application 65/, the C.L.A.C. dropped its creedal membership requirements but still retained constitutional provisions that permitted the expulsion of members for "reasons based on creed." Following the reasoning in Bosch & Keuning, the application was again refused. The chairman of the hearing, Mr. L.A. MacLean, stated the board's position on such applications: 66/

However, whatever qualifications for membership a union may legitimately impose, Section 10 of the Labour Relations Act plainly and expressly prohibits the Board from certifying a trade union

"... [i]f it discriminates against any person because of his race, creed, colour, nationality, ancestry or place of origin."

Also, Section 4 of The Fair Employment Practices Act provides that,

"No trade union shall exclude from membership or expel or suspend any person or discriminate against any person or member because of race, creed, colour, nationality, ancestry or place of origin."

While no definition of discrimination is contained in these statutes, it seems plain that they require that a trade union must extend the opportunity of membership and the rights incidental to membership, equally and impartially and on the same terms and conditions to persons of all creeds. Discrimination, of course, may take place, and it is often designed to elude detection by subtle and indirect modes of implementation. In this respect words, rules or practices of purported impartiality may well assume a different meaning and effect when viewed in the context of their actual application or practical consequences. In dealing with the question as to whether an organization discriminates against persons on account of their creed, the Board is concerned not only with the interpretation of the written words of the constitutional documents but also with the functional operation of the organization itself. In other words the Board is interested in deed as well as words.

In our view it would be clear discrimination against persons on the basis of their creed if they were required to subscribe to a theology other than their own as a condition of membership. The fact that the constitution or practices of an organization give formal lip-service to the fact that membership is open to persons of all creeds would not make such a condition any less discriminatory. It would merely amount to saying, for example, that a Jew could not be refused membership because of his creed, so long as he subscribed allegiance to the faith of Christianity for purposes and as a condition of membership. There seems little doubt that such a provision would exclude many persons from membership because of loyalty to their creed, which might well treat a pledge of allegiance to another creed for such purposes, as a betrayal of their faith. It seems to us that it would be idle to say that because the choice is left to them to decide whether or not they wish to join such an organization, that such a pledge does not subject such persons to discriminatory treatment on account of their creed. This would amount to saying that, while discrimination on the basis of creed cannot be done directly, it may be done indirectly. In our view this

is not the meaning of the legislation. It is our opinion that the legislation means that a person has a right not to be denied or excluded from membership or subjected to unequal conditions or terms of membership on account of his creed.

It would seem the Board in these applications showed a reticence to certify because of the unsatisfactory state of the evidence of bona fides brought by the C.L.A.C.; in other cases where religious unions have applied and indicated a clearly non-discriminatory policy, certification has followed. 67/ However, the Supreme Court of Ontario has quashed the Tange decision by way of certiorari. 68/ McRuer, C.J.H.C. indicated two bases for overturning the Board's ruling: first, he objected to the use of evidence adduced in earlier Board hearings with the C.L.A.C. in the instant case, thus paving the way for the holding that there was no evidence of discrimination upon which the Board could make a finding adverse to the union; and, second, he found that legislation used by the Board as a basis for its decision only prohibited creedal discrimination (i.e., religious or doctrinal beliefs), while in the instant case the sections of the union constitution found objectionable by the Board merely related to ethical or social principles. Both of these points seem to be open to question 69/; however, for the time being the position of the Board in this area is unclear. Most probably the Tange case is a unique case in so far as it relates to interpretation of union constitutions: as stated by the Court, the union constitution "sets a standard of social and ethical behavior that could not be objected to by any law-abiding citizen no matter what his creed might be". 70/ Discrimination of a less emotive nature would probably not receive such a charitable interpretation at the hands of a Canadian court.

In conclusion, the most effective protection afforded is that inherent in the practice of labour relations boards to refuse certification to unions

who practice discrimination in their membership. It must be pointed out, however, that this protection is limited by the facts (i) that the individuals so excluded rarely are able to take advantage of such proceedings because either they do not know of their existence or there are none pending at the time of the refusal; (ii) that such refusal to certify only brings pressure to bear on a union and does not necessarily result in the membership of any individual; and (iii) generally such protection is only effective at the time of certification, but not in proceedings subsequent to that process.

PROVISIONS IN UNION CONSTITUTIONS

This rather gloomy area of law takes on an even deeper hue when considered against the background of constitutional provisions found in Canada. The provisions for eligibility for membership are found in Table VI and fees for new members in Table VII.

A very cursory examination of these Tables points out obvious as well as potential abuses. Citizenship and political affiliation (not to speak of sex) offend basic democratic fundamentals and, in many jurisdictions, specific legislation; requirements of "good moral character" or craft skill, while desirable, can result in abuses. These, however, pale into insignificance beside the scope of initiation fees which unions' constitutions provide. Granted, the majority of the unions operate with maximums of fifty dollars or under, but still some 28,000 workers are subject to fees between \$200 and \$500. No figures are available with respect to dues for members or fees for right-to-work permits for non-members. It can be expected that these will be equally high.

TABLE VI

<u>CONDITIONS & RESTRICTIONS ON MEMBERSHIP</u>	<u>No. of Unions</u>	<u>No. of Members</u> (to nearest 1,000)
Approval of members required	14	418
Evidence of good moral character required	11	180
Citizenship requirement (must be either a Canadian citizen or a willingness and intention to become one)	4	76
Must not be a member of the Communist Party or a similar political organization which offends democratic principles	14	427
Competency in a particular trade (examination or decision as to a skill made by a committee of the local concerned)	7	114
Approval of a committee set up to screen applicants	10	140

- (a) There are three unions with 116,000 members that specifically forbid dual unionism.
- (b) The Brotherhood of Railway Trainmen is the only union examined which restricts membership to males.
- (c) In three unions with 46,000 members, on a vote by the membership a minimum of 3 blackballs is fatal to the application. In one of these 3, 2 blackballs on 2 ballots is fatal.
- (d) In one instance, the Association of Radio and Television Employees, the National Executive Committee can refuse for cause.
- (e) In the Brotherhood of Railway Signalmen a member can protest a new member in writing within 30 days, or 60 days if a member of another local.

TABLE VII

INITIATION FEES

Amount	No. of Unions With Minimum	No. of Members (To nearest 1000)	No. of Unions With Maximum	No. of Members (To nearest 1000)
\$ 1.00	5	119	1	6
2.00	8	122	1	6
2.50	1	52	-	-
3.50	1	16	-	-
5.00	8	313	5	123
10.00	3	28	3	32
15.00	2	18	2	112
20.00	1	23	1	3
25.00	2	9	2	53
35.00	-	-	1	8
50.00	-	-	2	3
200.00	-	-	1	6
240.00	1	15	1	15
300.00	1	11	2	7

- (a) There are 5 unions comprising 87,000 members providing for initiation fees of no set amount
- (b) There are 5 unions with no provisions for initiation fees comprising 67,000 members.
- (c) There are 6 unions with a set amount and 11 with a minimum and maximum. Both groups are included in the table.

CONCLUSIONS

This area of the law is an extremely difficult one with which to deal. Obviously, interference with a so-called "private" body's membership poses problems of some magnitude, especially if the proposals set out in Chapter II are accepted. Even so, it is still doubtful if unions should be able to preclude from membership any employee for whom they bargain on the basis of arbitrary and socially unsatisfactory practices: this weakens the morale of the union, heightens public antipathy toward the labour movement, and places the individual worker in the position where he cannot participate in the decisions that govern his contract of employment.

Quite obviously, any change will have to be of statutory nature: the common law is not likely to alter quickly enough to rectify the present position within a reasonable period of time. In this respect, no difficulty arises in remedying the defects in the indirect control mentioned above at the end of that section and this can easily be accomplished by minor changes in wording. Thus, labour relations boards should be able to sanction any union at any time where unreasonable admission requirements are used, the unreasonableness being left to the discretion of the board concerned. 71/

A more difficult problem is whether an agency should be created which can directly force a union to accept an employee into membership. 72/ Quite simply, this will not work out and, if other suggestions set out in this study are accepted, the need to take this step will be greatly reduced. This opinion evidently was not considered meritorious, for the Donovan Commission reached an opposite conclusion: 73/

Para. 1066.

An unsuccessful applicant for admission to a trade union, or the skilled section of a trade union, should be able to lodge a complaint that his application has been arbitrarily turned down. The complaint should lie in the first instance to the executive committee of the trade union. Thereafter a rejected applicant who still considers that his application has been arbitrarily rejected and that he is being caused substantial injustice should have a further right of complaint to a new and independent review body. If this body upholds his complaint it may issue a declaration that he should become and remain a member, and if rights of membership are withheld from him thereafter he will have the same legal right to obtain redress as any other member.

This "right of redress" would be in the form of compensation. All in all, it rings of a blend of the "agency" and "prima facie tort" approach.

Other solutions proffered have varied in their nature, but have reflected either the legislative, which we have accepted, or the judicial approach. Rideout, has indicated that, as far as the latter is concerned: 74/

[I]t would appear that the courts may take one of four lines of approach. They may cling to the idea of voluntary societies having the right to exclude when they choose and to impose a closed shop if they wish, unless and until the legislature says otherwise. Alternately they may insist on a right to work so that the union must either admit or give up its closed shop arrangements. On the other hand they may take the bold approach of declaring that a trade union is a public body, subject to full regulation by the courts so that admission may be ordered in any case. In the specialized case of unions which admit to a subordinate status the courts may hold that, once admitted, a member is entitled to full rights.

The second line of argument has obtained some support in the case of Nagle v. Feilden 75/ where this right, when taken in conjunction with the doctrine of restraint of trade 76/ or of public policy 77/, would force unions to accept members (open membership or open shop). The third seems unlikely except by means of legislation.

It is most probable that the first of these four approaches will continue to be the case, unless or until the courts are jolted by some flagrant case of discrimination or they become impressed with the injustices of a form of unionism that supports closed membership: closed shop. Legislation obviously remains the only way out, and certainly has the most possibilities for comprehensive coverage. However, the legislative process is slow moving. In the meantime, the "prima facie tort" doctrine provides a stop-gap measure which, while not of such a nature as to include the power to compel unions to accept qualified members, at least supply compensation for the lost working opportunity.

REFERENCES

- 1/ Summers, Internal Relations Between Trade Unions and Their Members, 91 Lab. Rev. 175, at 185 (1965).
- 2/ Weinberger v. Inglis, [1919] A.C. 606 (H.L.). See also the Commonwealth cases collected in Rideout, Protection of the Right to Work, 25 Mod. L. Rev. 137, at 139 (1962). For the United States position and general comments, see Bernhardt, Right to a Job, 30 Corn. L. Rev. 292 (1945); and Summers, Admission Policies of Labor Unions, 61 Q.J. Econ. 66 (1946).
- 3/ Frank v. National Alliance of Bill Posters, 99 Atl. 134, at 135 (N.J.S.C. 1916), per Swayze, J.
- 4/ Faramus v. Film Artistes Assn., [1963] 1 All E.R. 636 (C.A.); see Frank, Casenote, [1963] J. Bus. Law 280; Rideout, Casenote, 26 Mod. L. Rev. 436 (1963); and Casenote, 79 Law Q. Rev. 163 (1963).
- 5/ Per Upjohn L.J. at 646. Cf. his statement in Boulting v. A.C.T.A.T., [1963] 1 All E.R. 716, at 728 (C.A.), that: "It seems to me that a rule dealing with eligibility should be broadly construed and not narrowly".
- 6/ Or, to use the words of Professor Summers: "To say that there is no legal right to join a present-day labor union because membership involves a personal relationship, is to carry a misconceived precedent to utter absurdity." In Summers, The Right to Join a Union, 47 Colum. L. Rev. 33, at 41 (1947).
- 7/ See the discussion of "quasi-corporate" status in Wedderburn, Corporate Personality and Social Policy: the Problem of the Quasi-Corporation, 28 Mod. L. Rev. 62 (1965).
- 8/ See Denning L.J. in Lee v. Showmen's Guild of G.B., [1952] 1 All E.R. 1175, at 1181 (C.A.).
- 9/ Re Monsieur Henri Wines, 44 N.L.R.B. 1310 (1942).
- 10/ Batt v. Napier W.W.I.U.W., [1934] N.Z. L.R. 993.
- 11/ See Abbott v. Sullivan, [1952] 1 All E.R. 226, at 238 (C.A.) per Morris L.J. A brief discussion of the "admission" issue in England can be found in Rideout, Admission to Non-Statutory Association Controlling Employment, 30 Mod. L. Rev. 389 (1967).
- 12/ Nagle v. Felden [1966] 2 W.L.R. 1027; [1966] 1 All E.R. 689.
- 13/ Hickling, The Right to Membership of a Trade Union, [1967] U.B.C. L. Rev. 243, at 269. See also Rideout, supra ref. 11, at 392 ff.
- 14/ See Lenhoff, The Right to Work: Here and Abroad, 46 Ill. L. Rev. 669, at 696-697 (1951).

- 15/ Cox, Law and The National Labor Policy (1960), at 95.
- 16/ Hurwitz v. Directors Guild of America, 364 F. (2d) 67 (2d Cir. 1966). See Casenote, 65 Mich. L. Rev. 1673 (1967).
- 17/ This is noted in Rideout, The Right to Membership of a Trade Union (1963), at 15.
- 18/ [1946] 4 D.L.R. 114 (B.C.S.C.).
- 19/ Cf. Marlin v. Jockey Club of South Africa, [1951] 4 S.A.L.R. 638.
- 20/ [1951] 3 D.L.R. 641 (P.C.); rev'ing [1950] 4 D.L.R. 187 (B.C.C.A.); and [1949] 4 D.L.R. 662 (B.C.S.C.).
- 21/ At 191. See also Sidney Smith, J.A. at 201: "There can be little doubt that proper policy here is to oblige unions to be open to all whom they seek to represent in collective bargaining. A closed shop is intolerable where there is a closed union". See also Laskin, Collective Bargaining and Individual Rights, 6 Can. B.J. 278, at 282 (1963).
- 22/ Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, at 619 (1959).
- 23/ Cf. the statement of Wilson J.: "The argument is that the Legislature, having accepted closed-shop agreements, intended to protect workmen by requiring Unions to accept them as members, so that no workman would lose or be refused employment because of the existence of a closed-shop agreement. But if the Legislature intended to legislate thus, I would expect to find different wording clearly imposing on Unions the duty of accepting qualified workmen as members and not merely asserting the right of a working man to belong to an unspecified union". Gee v. Freeman, 16 D.L.R. (2d) 65, at 77-78 (B.C.S.C. 1959).
- 24/ Note, 79 Law Q. Rev. 163, at 166 (1963); cf. Hickling, supra, ref. 11, at 283-284.
- 25/ Wilcox, The Triboro Case - Mountain or Molehill, 56 Harv. L. Rev. 576 (1943).
- 26/ These theories are more completely discussed in Chapter IV infra. Briefly, the "property" theory indicated that a union member had a vested property right in the assets and programs of the organization, with the result that any expulsion not justified by the union's constitution or by-laws constituted an "illegal deprivation of property": Rigby v. Conell, L.R. 14 Ch. D 482 (1880). The contract theory envisaged a breach of contract where a member was expelled on grounds not provided for in the constitution or by-laws, as these documents represented the terms of an implied contract between the union and the employee: Orchard v. Tunney, [1957] S.C.R. 436. The inherent weaknesses and inconsistencies of these doctrines, such as the requirement that natural justice be followed, have been ameliorated only to the extent that procedural protections were built up. See Carrothers, Collective Bargaining Law in Canada (1965), pp. 522-537.

- 27/ E.g., White v. Kuzych, supra, ref. 15.
- 28/ Casenote, 65 Mich. L. Rev. 1673 (1967), at 1675.
- 29/ Ibid., p. 1673 ff; The Right of a Labor Union to Impose a Loyalty Oath as a Condition of Membership, U. Ill. L.F. 192, at 195-196 (1967). For a discussion of the doctrine see, Ward, The Tort Cause of Action, 43 Cornell L.Q. 28, at 52-53 (1958); Forkosch, An Analysis of the Prima Facie Tort Cause of Action, 42 Cornell L.Q. 4, at 465 ff (1957). Brown, The Rise and Threatened Demise of the Prima Facie Tort Principle, 54 Nw. U. L. Rev. 563 (1959); 52 Colum. L. Rev. 503 (1952).
- 30/ Tunney v. Orchard, [1955] 3 D.L.R. 15 (Man. C.A.) per Tritschler, J., at p. 39. The "status" interpretation was later rejected by the Supreme Court of Canada, [1957] S.C.R. 436, per Rand, J. Also see Carrothers, Case and Comment, 34 Can. Bar Rev. 70 (1956).
- 31/ Supra, ref. 24, at 198; supra, ref. 16, at 1675. Also Lloyd, Casenote, 36 Can. Bar Rev. 83, at 89, 92 [1958].
- 32/ Supra, ref. 11.
- 33/ Otherwise referred to as the "government-instrumentality" approach, and included in documents like the Universal Declaration of the Rights of Man.
- 34/ Rideout, supra, ref. 11, at 393-394; for a discussion of the doctrine see A.C. Cryslar, Restraint of Trade and Labour (1967), pp. 155, 200.
- 35/ Ibid., p. 395.
- 36/ Betts v. Easley, 161 Kan. 459, 169 P. (2d) 831 (Kan. Sup. Ct. 1946); Hewitt, The Right to Join a Labour Union, 99 U. Pa. L. Rev. 919 (1951); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1074 (1951); Symposium: Individual Rights in Industrial Self-Government - A "State Action" Analysis, 63 Nw. U. L. Rev. 4 (1968).
- 37/ Aaron and Kamaroff, Statutory Regulation of Internal Union Affairs, 44 Ill. L. Rev. 425, at 631 [1949]; Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, at 613 (1959).
- 38/ Union Disciplinary Power and Section 8(b)(1)(A) of the N.L.R.A.: Limitations on the Immunity Doctrine, 41 N.Y. U. L. Rev. 584 (1966); Local 138, Int'l Union of Operating Engineers (Charles C. Skura), 146 N.L.R.B. 679 (1964).
- 39/ Hickling, supra, ref. 13, at 262. This approach was that preferred by the Donovan Commission, para. 1066.
- 40/ This point is made by Cox, supra, ref. 22, at 621. For a summary of these methods, see Summers, supra, ref. 6, at 35; also Lenhoff, Right to Work: Here and Abroad, 46 Ill. L. Rev. 669, at 702-706 (1951).

41/ See s. 5A of The Labour Relations Act of Newfoundland, Stats. Nfld. 1960, c. 58 which reads as follows:

- (1) Notwithstanding any other provisions of this or any other Act, where a person
 - (a) is not a member of a union which is a party to a collective agreement but is otherwise qualified for employment by an employer who is a party to the collective agreement, and
 - (b) applies for membership in the union referred to in paragraph (a),

the employer may employ that person notwithstanding any provision of any collective agreement if the union refuses to accept that person into its membership.

- (2) Nothing contained in subsection (1) excuses an employee from complying with the constitution, rules and by-laws of a union of which he becomes a member.
- (3) Notwithstanding any provision in any other Act, any provision in the constitution, rules or by-laws of a union which is designed or operates to exclude from membership in the union a person referred to in subsection (1) is invalid.

Similar legislation exists in Saskatchewan: Stats. Sask. 1966, c.83, s. 16.

42/ The rationale for this may lay in the fact that many authorities, especially English ones, are of the opinion that discrimination situations which arise in relation to admission to or expulsion from unions, are few and far between. This attitude has most recently been reflected in the Donovan Commission Report, para. 610, which indicated that there was "little evidence that applications for membership are dealt with unfairly, or that membership is capriciously refused". (See also para. 1069.)

It seems that only in the areas of racial and religious discrimination has there been any legislation passed; this has resulted in a minimal amount of litigation.

43/ Industrial Conciliation and Arbitration Act, 1954, N.Z. no. 72, s. 73. (reproduced in appendix).

44/ Ibid., s. 174 H.

45/ Conciliation and Arbitration Act, 1904-1964, Australia, s. 143(1)(d); see also Industrial Code, 1920-36, South Australia, s. 85(1)(e). Reproduced in appendix. Under such legislation a £10 entrance fee was held unreasonable: Marine Cooks, Bakers and Butchers' Assn. ex. p. Snell, 27 C.A.R. 43, at 53 (1928).

- 46/ See, e.g., Trade Union Act Amendment Act, 1876, 39 & 40 Vict. c.22, s. 9 (U.K.). Reproduced in appendix. It should also be noted that the Landrum-Griffin Act refers only to membership and its remedies are not available to a person not already a member.
- 47/ See State Acts Requiring an Open Union as Condition of Validity of Closed Shop Contracts, 53 Harv. L. Rev. 500 (1940).
- 48/ In Ontario and British Columbia age is included, and the unions are prohibited from discriminating against persons between the ages of 45 and 65, respectively: The Age Discrimination Act, Stats. Ont. 1966, c. 3, s. 5(2); Fair Employment Practices Act, R.S.B.C. 1960, c. 137, s. 4(b). Further, Quebec introduces sex as a ground on which there may be no discrimination: Quebec Employment Discrimination Act, s. 3.
- 49/ In addition to the penal sanction, three provinces provide that after a conviction the Minister may apply to the courts for an order enjoining continuance of the offence: [Alta., s. 21(1); N.S., s. 19; Ont., s. 17]. Also, B.C. and Ontario will not certify a union if it discriminates: B.C.L.R. Act, s. 12(8); Ont. L.R. Act, ss. 10, 36.
- 50/ All jurisdictions, except the federal one replied. The effective dates of these figures are: Alta. - 8 Aug. 67; B.C. - 13 July 67; Man. - 2 Aug. 67; N.B. - 13 July 67; N.S. - 20 July 67; Ont. - 13 July 67; Que. - 20 July 67; and Sask. - 17 July 67. Since these dates it has come to the writer's attention that Ontario has had a further case soon to be heard.
- 51/ See Ontario Human Rights Commission, Special Announcements, 15 May 67.
- 52/ Note that the B.C. Labour Relations Act, s. 9(6)(b) "provides that no trade union or person acting on its behalf shall refuse membership, to any person or discriminate against him in relation to employment only because he refuses to make or makes a contribution or expenditure, directly or indirectly, to or on behalf of any political party or to or on behalf of any candidate for political office. It deals only with the expenditure of funds or the making of contributions. It does not deal with other aspects of the individual's political freedom such as, for example, freedom to vote for the candidate of his choice at an election, or to stand in opposition to a candidate favoured by the union, or to engage in an election campaign against such a candidate." Hickling, supra, ref. 13 at 282, but see generally 277-283.
- 53/ Professor Finkelman in Re Gaymer & Oultram, 2 Can. Lab. Ser. 76-429 (O.L.R.B. 1954). This principle was also applied in Re The Ottawa Citizen, 1 Can. Lab. Ser. 76-431 (O.L.R.B. 1954); and Re Parkhill Bedding & Furniture, 1 C.C.H. Can. Lab. Law Rep. p. 16,243 (Alta. Bd. Ind. Rel. 1962). But see, contra, Re Creamette Co. of Can., 1 Can. Lab. Ser. 60-1047; C.C.H. Lab. Law Transfer Binder (1955-59) p. 16,023 (Man. L.B. 1955); cert. granted 18 W.W.R. (n.s.) 250 (Man. Q.B. 1956); on rehearing certification granted without reason: 1 Can. Lab. Ser. 60-1061; C.C.H. Lab. Law Transfer Binder (1955-59) p. 16,032 (Man. L.B. 1956).

- 24/ Other situations have arisen, for example, questions of nationality: Re Nicky's Plush Toys Mfg. Co., O.L.R.B. Mon. Rep., Mar. 62, 435; cf. Re Hamilton Tug Boat Co., C.C.H. Lab. Law Transfer Binder (1955-59) p. 16,054 (Can. L.R.B. 1956). On the other hand, semble, membership in the Communist party as a basis for expulsion need not disqualify a union: Re Creamette Co., 1 Can. Lab. Ser. 60-1061; C.C.H. Lab. Law Transfer Binder (1955-59) p. 16,032 (Man. L.B. 1956).
- 55/ Re B.C. Electric Ry. Co., 1 Can. Lab. Ser. 50-1207 (B.C.L.R.B. 1953); cert. refused 13 W.W.R. (n.s.) 273 (B.C.S.C. 1954).
- 56/ Re Gillis Quarries, 1 Can. Lab. Ser. 50-1202 (Man. L.B. 1952). On the interpretation of union constitutions by labour relations boards, see the comments of MacDonald, J. in Re Certification of Dist. No. 26, U.M.W.A., 44 M.P.R. 270, at 275 (N.S.S.C. 1960): "...[A]ny proper reading of union constitutions must have regard to the twin-fact that they are practical documents written for the governance of workmen and their various units or organization, and couched in language appropriate to the laymen who compose and manage those units."
- 57/ See, e.g., Re John E. Riddell & Son, 2 Can. Lab. Ser. 76-564; C.C.H. Lab. Law Transfer Binder (1955-59) p. 16,085 (O.L.R.B. 1957) where Professor Finkelman distinguishes the Gaymer & Oultram case, supra, ref. 53, on the basis that in the latter case no evidence was tendered as to actual practice followed by the union.
- 58/ Re Bosch & Keuning, 2 Can. Lab. Ser. 76-455; C.C.H. Lab. Law Transfer Binder (1949-54) p. 17,086 (O.L.R.B. 1954).
- 59/ Then R.S.O. 1950, c.194, s. 34(b); later R.S.O. 1960, c.202 s. 34.
- 60/ Stats. Ont. 1951, c.24, s. 4; now R.S.O. 1960, c.132, s. 4.
- 61/ Re Woodbridge Concrete Products, 2 Can. Lab. Ser. 76-589; C.C.H. Lab. Law Transfer Binder (1955-59) p. 16,105 (O.L.R.B. 1958).
- 62/ See supra, ref. 58.
- 63/ Some doubt has been cast on this practice of using evidence at one hearing at a later and separate hearing: McCord Case, [1956] O.W.N. 578 (S.C.); but it is difficult to accept this as the applicant was party to both hearings and, in any event, this type of fact-finding is exactly what an administrative body is set up for: Gellhorn, Official Notice in Administrative Adjudication, 20 Tex. L. Rev. 131 (1941).
- 64/ Re Tange Co., 2 Can. Lab. Ser. 76-797; 1 C.C.H. Lab. Law Rep. p.16,224 (O.L.R.B. 1961).
- 65/ Idem, 2 Can. Lab. Ser. 76-803.
- 66/ See, e.g., Re Harm Schilthuis & Sons, O.L.R.B. File No. 17088-59 (1959).

- 67/ Reg. v. O.L.R.B., ex p. Trenton Const. Workers Assn., 39 D.L.R. (2d) 593 (Ont. S.C. 1963).
- 68/ On the first point see supra, ref. 64. On the second point it is to be noted that members can be expelled for "reasons based on creed", that meetings were attended by psalm-singing, bible-reading, and so on. In light of this it is hard to see the rationale for the distinction made.
- 69/ Supra, ref. 68, at 607. He continues: "I would be very loathe to hold that the Legislature meant that a trade union that sought to maintain such standards of behavior could not be certified, while one that permitted among its members anarchists, Communists, and disciples of all sorts of violence could be certified". Similar arguments are found elsewhere in the judgment. It is submitted, however, that the characteristics of individual members is irrelevant: as has been noted judicially, a union may, for example, have a large number of Communist members as long as legitimate union objectives are not subordinated to political ends.
- 70/ See, e.g., the suggestions made with respect to the United States in Newman, The Closed Union and the Right to Work, 43 Colum. L. Rev. 42 (1943).
- 71/ On this note the statement made in the comment, supra, ref. 48, at 502: "The union is thereby required to determine the scope of unreasonableness at the risk of losing its contract without an opportunity for reconsideration of its errors; and ultimately the enforcing body must distinguish between the outwardly similar practices of unreasonable exclusion in order to attain a monopoly and reasonable exclusion for the purpose of protecting legitimate union interests. ... The introduction of such hostile regulation at this stage of the labor movement seems an ill-advised step likely to nullify much of labor's previous legislative gains".
- 72/ Also see paras. 609-617.
- 73/ Supra, ref. 17, at 6.
- 74/ Supra, ref. 14, at 1041, per Salmon and Denning, JJ., at 1034.
- 75/ Rideout, supra, ref. 11.
- 76/ Hickling, supra, ref. 13.

CHAPTER IV

PROCEDURAL PROTECTIONS OF THE RIGHT TO REMAIN IN A UNION

The significance of union membership has been set out in Chapter I. It naturally follows from the adumbration of these rights and potential benefits to a unionist that there is value in ensuring that such membership is not stripped from a person in an arbitrary manner. Such actions, if allowed, are not only repugnant to the prevailing community concepts of justice, but are also destructive of the structure of collective bargaining. Indeed, it is not necessary that such arbitrary action lead to loss of work by the triggering of a union security clause or even mere loss of union membership to achieve such results: failure to comply with basic natural justice in any aspect of union disciplinary action can undermine the faith of members of that union in its effectiveness as a bargaining agent and thus lead inevitably to a failure of the collective bargaining system in the unit affected. 1/ Therefore this chapter will examine not only the problems of expulsion but also all areas of union discipline. In so doing, the protection afforded by courts and other administrative agencies will be measured against actual practices in these areas as a basis for suggested change in this area.

Before continuing, one further comment is necessary: by dealing with disciplinary procedures at this point it is intended to defer discussion of the substantive bases for such action to the next chapter. This is not always possible, however, and so some mention of the latter topic is set out here.

THE BASIS OF COURT INTERVENTION

It is only in the area of union discipline that the courts have evolved any coherent and faintly satisfactory system of protection for the individual worker. No doubt the reason for this has been that it has been simpler for them to analogize from existing legal concepts: accepting the private nature of a union, it is easier to visualize the rationale for protecting a right that is in existence than it is to see an obligation on the part of a union to accept a worker into its membership.

Originally, the courts stated that they were intervening to protect the vested right of a member of a union in the association's property. 2/ Because this approach was only possible where the union owned property and did not take into account the important non-material values inherent in union membership, it is fortunate that it was rejected in favour of a contractual basis for intervention. 3/ Thus, courts were willing to intervene to enforce terms of the union constitution that forms the basis of the contractual relationship between members. 4/ Unfortunately, as has been pointed out 5/, the contract theory "does not, without substantial qualification, guarantee any real protection for the individual member". An example of this is shown in the strict adherence to the union constitution in the Faramus case. 6/

As a social, as opposed to a legal fact, it is clear that the position of a member of a union is one based on status rather than contract: 7/ the position of the vast majority of prospective union members is that their only choice is to join or reject the union; none has the power to bargain for either the terms upon which he will join the union or, indeed, his contract of employment 8/ which itself introduces a third party into the rights

surrounding membership, a fact which strengthens the status argument. Unfortunately, if recognized, this societal fact has rarely 9/ found expression in the judges' opinions. However, in Orchard v. Tunney 10/, which has been called the leading case indicating a change in judicial attitude in this area 11/, there has been an attempt to introduce this concept in Canada.

In this case Tunney was expelled from the defendant union because he had claimed one of its officers was stealing union funds, a claim whose validity was accepted by the court. At the time Tunney had had resort to the Manitoba courts he had not completed the final stage of appeal provided by the union constitution: a tribunal that met every five years in Florida. The normal approach to this case would be to decide whether Tunney must first exhaust the methods of internal appeal provided by the union constitution and to which he had "contracted" to abide. While before the Court of Appeal of Manitoba, however, the following statement, concurred in by the rest of the court, was made by Triteschler, J.: "I cannot myself accept the theory that the relationship between a member of a Union and his Union is purely contractual. It starts in contract but once created the relationship ripens into status. The wrongful destruction of this status is a tort." 12/

Rand, J. distinctly repudiated this "ill-defined" approach in the Supreme Court of Canada in the following words: "...[T]o declare a contractual provision to be an incident of a newly recognized status would be an unnecessary act of legislation; to extend it to an element beyond the contract would be to embark upon legislative policy in an unwarranted manner." 13/ Despite this rejection, academics (if not judges) rushed to defend the Manitoba Court of Appeal; a spate of notes and articles appeared. 14/

The burden of the arguments advanced was that the pejorative "ill-defined" of Rand, J., should be really termed "flexible"; the appeal of this latter term was heightened because it would provide protection for prospective as well as expelled members. Thus, the plea became one for judicial inventiveness; unfortunately it has not obtained the judicial recognition it merits and, for the present, contract remains the basis for intervention at common law.

It should not be thought that the issue is completely dead. The arguments in its favour are strong and it has been accepted not only in countries such as Germany 15/, but also in the common law jurisdiction of New Zealand. 16/ Such change, however, is not likely to be speedy. 17/ In any event, as will be seen, there is a fair degree of flexibility in the contract theory especially when arising out of court-implied conditions stemming from the nature of certification. 18/

THE EXHAUSTION OF REMEDIES DOCTRINE

Because the courts stress the contractual element as a basis for intervention in expulsion cases, the rule has been firmly established in Canadian 19/, as well as other common law jurisdictions 20/, that the expelled member must, before having recourse to the courts, exhaust the internal remedies provided by the union constitution. 21/ Despite potential faults, such a rule is necessary because unions should be given a reasonable opportunity to correct mistakes committed by its subordinate bodies, thus maintaining independent self-government. 22/

The Canadian courts have been aware that since expulsion from a trade union is tantamount to "industrial death" 23/ an overly stringent application

of this rule is to be avoided. Unhappily the Privy Council in the important case of White v. Kuzych 24/ has had an inhibiting effect on the development of a clear rule in this area. In this case a member of a union who had already been illegally expelled and then reinstated by the courts 25/ was again expelled by a tribunal of the same union which was declared by all courts in which the case was heard to be at the very least biased. Although Kuzych did not attempt to avail himself of the appeal provided by the union constitution, the British Columbia courts held that this obvious bias made both the original hearing a nullity and the appeal futile, either of these points being sufficient to exclude the exhaustion of remedies doctrine. The Privy Council, however, decided that all the original tribunal had to do was arrive at a "conclusion" that would not be invalidated by the existence of bias; further, it concluded that there was no proof that the tribunal to which Kuzych failed to appeal would be biased. Thus, Kuzych lost his case and it seemed that the Privy Council had indicated that unions would be given a freer hand in matters of expulsion.

With the cessation of appeal to the Privy Council, Canadian courts have sought to limit the application of White v. Kuzych as much as possible. 26/ In general, this approach is shown by the record of court litigation in this area (see Table VIII) where in only four cases out of twenty where the issue of exhaustion of remedies arose was the plaintiff required to follow the provisions in the union constitution. No doubt this attitude is in part attributable to popular beliefs concerning the slowness and relative inaccessability of the appeal tribunals. A cursory examination of Tables IX and X indicates that such fears are well-founded: the final appeal body is usually the union convention (generally not annual) and the lower procedures rather shabby. In this effort, however, they have nearly obliterated

TABLE VIII

RECORD OF CANADIAN COURT LITIGATION IN CASES
INVOLVING THE EXHAUSTION OF REMEDIES DOCTRINE*

Whether Required	No. of Cases	Citation
<u>Required</u>	4	[1925] 3 D.L.R. 841 (P.C.) [1951] 3 D.L.R. 641 (P.C.) 21 D.L.R.(2d) 58 (B.C.S.C. 1959) 65 CLLC P. 14,139
<u>Not Required</u>		
(a) appeal provisions unreasonable	2	dictum: [1957] S.C.R. 436 dictum: 26 W.W.R. (n.s.) 546 (B.C.S.C. 1958)
(b) bad faith	2	[1957] S.C.R. 436 [1958] O.W.N. 217
(c) non-compliance with con- stitutional requirements	2	[1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436
(d) absence of substantive jurisdiction	5	[1944] 4 D.L.R. 775 (B.C.S.C.) [1948] Que. K.B. 671 [1958] O.W.N. 217 (C.A.) 65 CLLC P. 14,092 66 CLLC P. 14,117
(e) defect of "natural justice"	4	74 Que. S.C. 286 (1935) [1946] 1 W.W.R. 78 (B.C.S.C.) [1950] Que. K.B. 622 [1958] O.W.N. 217 (C.A.)
(f) not classified	1	48 R.L. (n.s.) 51 (1938)

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

traditional legal distinctions and have failed miserably to define clearly any basic, comprehensive rules. 27/

Because the exhaustion of remedies rule is basically an application of the maxim pacta sunt servanda to the constitution of an unincorporated association, the first exception to it is that the hearings provided comply exactly with the terms of the union constitution; if it does not, the action is ultra vires and, hence, a nullity. 28/ Engrafted on this is the limitation that the expulsion procedure conform to the dictates of "natural justice" 29/ which, in a sense, is merely one aspect of the audi alteram partem rule. Indeed, on this second heading there is strong authority that any stipulation in a union constitution that does not conform to the principles of natural justice will be invalid. 30/ Both of the exceptions stem from different but relatively clearly understood legal concepts and together are capable of forming the whole basis of analysis of court intervention in expulsion cases. Courts, however, do not always seem to be aware of this simple fact. 31/

One further exception or qualification has received some notice. That is that the appeal machinery must be reasonable. One author stated that it 32/,

...is too early yet to state with assurance that the imposition of the standard of reasonableness is a rule of law as distinct from an implied term.... But the cases are pending in the direction at least that appeal machinery be subject to the standard of reasonableness as a matter of law unassailable by bargain to the contrary.

Table VIII indicates that only two cases out of twenty have adopted this attitude, with the inference arising from this fact, that this criteria is still questionable in law, though obviously a welcome addition. 33/

TABLE IX

TIME LIMITS IN PROCEDURES FOR FILING
AN APPEAL BY A UNION MEMBER

TIME LIMITS TO FILE APPEAL	FROM OR WITHIN LOCAL		FROM OR WITHIN INTERNATIONAL	
	Unions	Members(1)	Unions	Members(1)
All constitutions providing for appeal	46	922	43	772
Constitutions providing time limits				
5 days	1	15	1	3
10 days	3	19	3	22
2 weeks	2	12	-	-
15 days	5	102	2	31
20 days	3	49	1	8
30 days	22	470	21(2)	519
45 days	1	42	-	-
60 days	3	152	3	39
90 days	1	20	1	20
3 mos.	2	19	1	6
1 year	-	-	1	11
Constitutions not providing limits	3	22	9	113
Constitutions not providing for appeal	1(3)	1	4	151
Constitutions not providing for trial	3	19	3	19

(1) Members to nearest thousand.

(2) One constitution provides for time limits of 45 and 30 days and one provides for 30 and 60 days depending on the level the appeal has reached.

(3) No provision for a local trial.

TABLE X

FINAL APPEAL BODIES (1)

FINAL APPEAL BODY	Unions	Members(2)
Constitutions providing for final appeal to union convention:	36	684
Convention for all appeals	30	527
Convention or public review	2	112
Convention or referendum	1	1
Convention or president or executive board or national council	3	44
Constitutions providing for final appeal to other bodies:	11	239
Executive board	8	215
Referendum	1	3
Internal appeal board	1	20
Public review board	1	1
Total constitutions providing for appeal	47	923

(1) A final appeal board is defined as the highest body authorized to pass on an appeal before the accused was considered to have exhausted all remedies within the union.

(2) Members to nearest thousand.

TABLE XI

FREQUENCY OF CONVENTIONS 1/

Frequency of Conventions	Total Studied(1)	
	Unions	Members
All constitutions providing for final appeal to the convention	36	645
Yearly	4	35
Every 2 years	15	336
Every 3 years	3	61
Every 4 years	11	210
Every 5 years	2	39
Other frequencies	1(2)	3

(1) To nearest thousand

(2) Convention every 32 to 38 months

1/ See the Minister of Trade and Commerce, Annual Report Under the Corporations and Labour Unions Returns Act (Can. 1965, Part II - Labour Unions), p. 71, for more complete figures for all of Canada.

THE ULTRA VIRES EXCEPTION

It is important to maintain the distinction between expulsions that are ultra vires and those that are merely contrary to natural justice for several reasons. First, if the expulsion is ultra vires the member affected may bring an action for a declaration immediately, rather than wait to go through the union's appeal system 34/; and, secondly, if the expulsion is ultra vires there is no possibility that the union can cure the defect 35/ or that the affected member can acquiesce in the error 36/ as would be possible in cases resulting from breaches of natural justice. Both of these results stem from the fact that an ultra vires act is an absolute nullity. On the other hand, it is more difficult to obtain damages in ultra vires situations because it would seem necessary to prove malice 37/; in expulsions tainted by breaches of natural justice this requirement does not seem to exist, possibly because the very facts of such breach lead to a conclusion of mala fides on the part of those causing the expulsion.

In essence, then, the problem facing the courts in ultra vires situations is merely to interpret the union constitution and see whether the acts in question find actual or implied support there. In this respect, cases dealing with non-business groups have always strictly limited the ambit of their activities. 38/ The same has generally held true in union cases in Canada, whether they dealt with membership 39/ or the union's legitimate activity. 40/ This tendency has, therefore, worked to the benefit of the individual worker. An examination of litigation in this area shows the tendency of the courts to apply this doctrine. In 19 cases involving the question of discharge from union membership where the court intervened to alter union action, it did so 7 times on the basis of ultra vires and 9 times on the basis of natural justice; the remaining 3 times involved conspiracy or protection of a statutory right. See Table XII.

THE "NATURAL JUSTICE" EXCEPTION

The courts, in Canada at least, have been rather unsure of what union activities should be considered as being in breach of "natural justice" in expulsion cases. Partly, this has stemmed from the fact that many courts regard unions as "domestic" tribunals having a greater immunity from review by way of certiorari than normal "statutory" tribunals. 41/ The difference is one of degree rather than kind, and the courts are not sure where to draw the line. It would seem that such a distinction is misleading in that it further muddies already murky waters and also bears little relation to the reality of the situation. This distinction, however, may be becoming meaningless as is exemplified by Denning, L.J.'s judgment in Lee v. Showmen's Guild 42/, where he seems to impose limitations of natural justice on union tribunals similar to those placed on any public tribunal. 43/ Indeed, faced with this situation, the law in this area evolving around statutory tribunals would seem to provide most adequately for the courts' guidance. 44/

The courts, however, are gradually developing rules that must be followed by unions in expulsion cases, the breaching of which, even if there is no damage done thereby, results in court intervention. 45/ It seems clear that a union member must be afforded a real hearing before the union can expel him 46/ and that this hearing cannot be excluded by the union constitution. 47/ Thus, following Lee v. Showmen's Guild 48/, hearings have become matters controlled by the courts rather than by the union constitution.

Although there was at one time some division on the point, it seems clear that hearings need not be held in the same way as in a court of law. 49/

The "real hearing" envisaged is one where the individual to be expelled is notified of the specifics of the charge against him 50/ and the time of the hearing. 51/ With respect to this last qualification, the hearing must be held at a place accessible to the member and at a time that is not too far in the future. 52/ At the hearing the accused must be able to attend 53/, cross-examine the witnesses 54/, and make arguments to the persons judging the case. 55/ On the other hand, he has no right to counsel or to demand that evidence be given in any way, etc. 56/ The only other aspect of these cases with which the courts have recently dealt has been that of the judges; the courts have demanded that they not be changed in the middle of the case 57/, nor be biased. 58/ This sounds suspiciously like the limitations placed on the proceedings of statutory tribunals.

The practices shown by union constitution—partial though they may be—do not seem to accord to these curial requirements at all. Aside from questions as to the bases for expulsion, procedural safeguards would appear to be few. For example, the time limits of appeals (shown in Table IX) are far out of line with the above. Cases themselves give a brief glimpse of many other defects, such being attributable, perhaps, to the fact that trials generally occur at the local level where expertise in these matters can be expected to be low. [See Table XIII] Only in the area of right to counsel (one not demanded by law) is there protection of a procedural nature set out. Consequently, it can be assumed that the court-implied requirements of natural justice are far from scrupulously followed in real life.

TABLE XII

GROUNDS FOR JUDICIAL INTERVENTION IN UNION DISCIPLINE (EXPULSION)

CASES: INCIDENCE AND RELIEF *

GROUNDS	NO. OF CASES	RELIEF	CITATION
Action in Violation of Union Constitution	7	injunction damages-declaration-injunction declaration damages-declaration declaration-injunction damages-mandamus damages-declaration	60 B.C.R. 246 (S.C. 1944) [1944] 4 D.L.R. 775 (B.C.S.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) [1961] S.C.R. 682 31 D.L.R. (2d) 441 (B.C.S.C. 1962)
Action Contrary to Natural Justice	5	damages-mandamus declaration mandamus declaration-injunction damages-declaration	74 Que. S.C. 286 (1935) [1946] 1 W.W.R. 78 (B.C.S.C.) [1950] Que. K.B. 622 [1958] O.W.N. 217 (C.A.) 31 D.L.R. (2d) 441 (B.C.S.C. 1962)
Bad Faith	3	damages-mandamus damages-declaration declaration-injunction	48 Rev.Leg.(n.s) 51 (Que.S.C.1938) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.)
Protection of Statutory Right	2	mandamus injunction	[1950] Que. K.B. 622 65 CLLC P. 14,405 (B.C.S.C.)
Conspiracy	1	damages-declaration-injunction	26 D.L.R.(2d) 678 (B.C.S.C.1961)
Unreasonable Appeal Provision	1	damages-declaration	15 W.W.R.(n.s.) 49 (Man.C.A.1955)

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the
 Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

UNENFORCEABLE UNION RULES

The courts are also developing a line of protection to the individual which does not, strictly speaking, belong to either of the traditional categories of ultra vires or "natural justice" as it relates to limitations on substantive charges that may form the basis of expulsion; thus, for analytical purposes, a distinction should be made between breaches of "substantive natural justice" and "procedural natural justice". It is to be noted, however, that both entail the same consequences. Specifically, this protection, as set out by the Supreme Court of Canada in S.I.U. v. Stern 59/, is that a union cannot legally expel a member because that member fails to engage in union activities which are themselves illegal, that is, tortious. Thus, in the Stern case when the plaintiff was expelled from the union for failing to follow the defendant union's directives to boycott a hotel which would not accommodate its members, it was held that the expulsion order be set aside. 60/ It is also clear that such activity results in an action for damages against the union or its executive committee. 61/ Obviously, this limitation cannot be classed as ultra vires as there is no question of the capacity of the union to perform the impugned act 62/; rather, the act is illegal and as such could be subsumed under a heading of "substantive natural justice". Thus, a whole new avenue is opened for the courts to protect individual workers against abuses of union security because illegality may arise from a statutory as well as a common law basis. 63/ More properly, however, this relates to the scope of decisions which a union can make and so will be dealt with in the next chapter.

Finally, of course, the common law provides remedies to employers who are threatened with strikes or other coercive action by unions to enforce

TABLE XIII

PROVISIONS FOR TRIALS OF MEMBERS AT THE

LOCAL UNION LEVEL

Type of Provisions	Unions	Members (1)
Constitutions providing local union trial procedures	45	918
Constitutions not providing for local union trials	5(2)	23
Total Constitutions	50	942

(1) Members to nearest thousand.

(2) Three of these union constitutions had no provisions for trial at any level.

TABLE XIV

ASSISTANCE OF COUNSEL IN LOCAL AND INTERNATIONAL

DISCIPLINE PROCEEDINGS

PROVISIONS CONCERNING COUNSEL	Local Procedures		Procedures Above Local Level	
	Unions	(1) Members Percent of Members	Unions	(1) Members Percent of Members
All constitutions providing for counsel in local or inter- national trial proceedings	33	684 100	12 268	100
Constitutions granting assist- ance of counsel in trial and appeal proceedings	32	668 98	12 268	100
Counsel guaranteed without qualifications	6	196 29	3 146	55
Only members eligible to act as counsel	25	383 57	9 122	45
Other	(2) 1	89 13	- -	-
Constitutions granting assistance of counsel of discretion of the local union	1	16 2	- -	-

(1) Members to nearest thousand.

(2) Must be a member within the trade union movement.

membership rules. 64/ This is outside the scope of this paper, however, and so need only be mentioned.

FORMS OF RELIEF: UNION ENTITY

The courts are also broadening the relief available in these cases (for a breakdown of which, see Table XV): although one cannot, as against a company, obtain interim injunctive relief to prevent the enforcement of a union security clause 65/ such relief is obtainable against the union if the accused can raise a "fair question" as to the union's failure to observe the requirements of natural justice 66/; this second remedy vitiates the effects of the first decision. Declarations and damages 67/ are also available; the latter remedy, however, has suffered from the fact that, until recently, such actions had to be against individuals rather than the union as a whole. At a very early date in union development, Professor Dicey noted that, by the act of combination, unions "create a body which, by no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted". 68/ Courts, however, continued to characterize unions as mere groups of people, thus not only limiting suits by outsiders against the "union" to actions against the individuals who compromised this group, but also precluding many suits in damages by irregularly expelled members against the "union" as an entity. To be sure, in England the courts had, at the turn of the century, attempted to make unions as such liable in damages for illegal strikes 69/; however, pressure from labour resulted in legislation which nipped this change in the bud. 70/ It was not until the last decade that English courts made another attempt to attach corporate status to trade unions. 71/ Thus, in Bonsor v. Musicians' Union 72/ the House of Lords seemed to accept, at least in part 73/, that trade unions

are legal entities with rights and duties which attach to the union as opposed to its members. Canadian courts have been far bolder in this regard.

Following World War II, arguments in favour of endowing unions with a quasi-corporate nature found receptive audiences on the Bench. Quebec courts seem to have accepted this doctrine 74/ and, to a limited extent, so did the courts in British Columbia. 75/ The Newfoundland Supreme Court even went so far as to apply the Taff Vale case. 76/ In 1957, it seemed that the Supreme Court of Canada had rejected this view in Orchard v. Tunney. 77/ However, in 1960 this body made it clear in the Therien case 78/ that it regarded unions as corporate entities. Locke, J. indicated the Court's view of the inference that is to be drawn from the effect on trade unions of modern collective bargaining legislation: "The granting of these rights, powers and immunities to these unincorporated associations or bodies is quite inconsistent with the idea that it was not intended that they should be constituted legal entities exercising these powers and enjoying these immunities as such." 79/ Other Canadian courts, unless hampered by direct legislation 80/, quickly used the Therien reasoning to give unions corporate status in both strike 81/ and expulsion 82/ situations.

The inexorable development of law, not only in common law jurisdictions but also those of the civil law 83/, seems to lead to the recognition that trade unions are quasi-corporate entities for purposes that relate to their functions as indicated by appropriate collective bargaining legislation. Canadian courts have made great strides in this direction and there is no doubt that in the near future this concept will be

universally accepted. If courts can say that by usage Indian idols 84/, athletic clubs 85/, or credit unions 86/, are entities, separate from their members, surely there is no problem in drawing appropriate inferences to the same effect from modern labour legislation. 87/ Although the exact limits of this corporate status are vague and difficult to define, one should not regard this as meaning that change must come through legislation. 88/

There is, at present, some legislation in Canada constituting trade unions as corporate entities 89/ and no more may be needed because courts, due to their experimental approaches, have in this area proved capable of performing the task of fitting union status to societal facts. At one time the writer thought that it would be difficult to imagine that any legislation would be an adequate substitute or even a complement to the present situation as such legislation might well inhibit rather than promote developments in this field. 90/ Upon reflection, however, this view may not be warranted. The reason for this change lies in the fact that courts may just be too slow in this development. In any event, the Task Force should consider this matter.

CONCLUSIONS

Opinions vary on whether or not judicial protection in expulsion cases is satisfactory. Some proponents of the status quo argue that the courts offer sufficient protection to make unions adhere to their constitution, forgetting that the rules themselves may be at the root of the trouble. 91/ Others stress the fact that the present situation fosters "independent self-government" as it develops "responsibility on the part of unions". 92/ These arguments are far from compelling: an emphasis on contractual relations between the union and its members necessarily limits the flexibility of

TABLE XV

RELIEF SOUGHT IN UNION DISCIPLINARY (EXPULSION) CASES
DISPOSITION OF CLAIM *

NATURE OF CLAIM	<u>DISPOSITION</u>		CITATION
	Allowed	Dismissed	
Damages	9		74 Que. S.C. 286 (1935) [1944] 4 D.L.R. 775 (B.C.S.C.) [1946] 4 D.L.R. 114 (B.C.S.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) 26 D.L.R.(2d) 678 (B.C.S.C. 1960) 31 D.L.R.(2d) 441 (B.C.S.C. 1961) [1961] S.C.R. 682
		5	29 O.R. 151 (1897) [1925] 3 D.L.R. 841 (P.C.) [1951] 3 D.L.R. 641 (P.C.) 26 W.W.R.(n.s.) 546 (B.C.S.C. 1958) 21 D.L.R.(2d) 58 (B.C.S.C. 1960)
Declaration	7		[1944] 4 D.L.R. 775 (B.C.S.C.) [1946] 1 W.W.R. 78 (B.C.S.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) 26 D.L.R.(2d) 678 (B.C.S.C. 1960) 31 D.L.R.(2d) 441 (B.C.S.C. 1961)
		6	[1925] 3 D.L.R. 841 (P.C.) [1946] 4 D.L.R. 114 (B.C.S.C.) [1950] 4 D.L.R. 685 (B.C.S.C.) [1951] 3 D.L.R. 641 (P.C.) 26 W.W.R.(n.s.) 546 (B.C.S.C. 1958) 21 D.L.R.(2d) 58 (B.C.S.C. 1960)
Injunction	3		60 B.C.R. 246 (S.C. 1944) [1958] O.W.N. 217 (C.A.) 65 CLLC P. 14,045 (B.C.S.C.)
		4	[1925] 3 D.L.R. 841 (P.C.) [1943] 4 D.L.R. 441 (Alta. C.A.) 26 W.W.R.(n.s.) 546 (B.C.S.C. 1958) 24 D.L.R.(2d) 737 (B.C.C.A. 1960)
Mandamus	5		74 Que. S.C. 286 (1935) [1948] Que. K.B. 671 [1950] Que. K.B. 622 [1958] Que. K.B. 709 [1961] S.C.R. 682
		1	[1954] Que. S.C. 309

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

approach needed in this area. 93/ To maintain the principle of collective bargaining, a worker must be accorded treatment which is in line with the prevalent expectations: this does not occur now, but the philosophy and legal rules developed to protect personal freedoms generally provide helpful guides in working out detailed legal rules to govern union discipline cases. 94/

To say this is not to forget that the real problem in evaluating present disciplinary procedures is whether the union itself should continue to be the sole judge of the propriety of the substantive rules forming the basis of union membership. If the answer is no, the preceding analysis shows a picture fairly satisfactory to the individual; if not, the above, or indeed any, protection merely provides temporary safeguards, easily circumvented by unions. Clearly, the latter position is untenable. This development (which has been much hoped for in some quarters) 95/, however, will be dealt with in the next chapter. For now, it is sufficient to indicate that the problems are interrelated and that some suggestions for change will be made.

The procedural rules that should apply: Without going through the previous discussion on this matter exhaustively it is suggested that minimum procedural safeguards should be contained in governing legislation. Quite briefly, the present curial rules, although passably acceptable from a theoretical point of view, are too vague for application in the day-to-day pragmatic life of a union hall. Again, these requirements are not obvious to the rank-and-file; a specific statutory directive in layman's terms is far more effective.

To this end, legislation such as s. 105(a)(5) of the Labor Management Relations Act of 1959 (LMRA), which reads: 96/

105(a)(5). No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for non-payment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

In so doing, however, consideration should be given to spelling out the contents of (C): i.e., that it subsume (i) a right to be heard; (ii) a right to be tried by an impartial body; (iii) a right to be represented by counsel; (iv) a right not to be subjected to double jeopardy; (v) a right to a speedy and accessible appeal (if such is given); and (vi) a right to a reasoned decision.

Exclusion of courts from this process: Theoretical criticisms have long been levelled against courts as arbiters of these matters: they are expensive, time-consuming, and difficult to obtain a judgment from. 97/ These arguments seem valid: on the basis only of time lost between the imposition of discipline and a final court decision is recorded (see Table XVI) it seems unfair to continue the present situation. In this respect, it should be noted that almost one-half the cases go beyond the trial level (see Table XVII). The question that arises, of course, is who should then be fitted with this task?

Three possibilities seem to exist: (i) existing labour relations boards; (ii) some variation of the United Automobile Workers (U.A.W.) Public Review Board; and (iii) arbitration boards. Of these three, one can immediately drop the second alternative. Although it works well in the context of the U.A.W. 98/, it is far too slow (being a final appeal

TABLE XVI

ELAPSED TIME BETWEEN CAUSE OF DISCIPLINE (EXPULSION) AND

FINAL DISPOSITION BY COURT *

ELAPSED TIME	NO. OF CASES	CITATION
under 1 year	8	[1944] 4 D.L.R. 775 (B.C.S.C.) 60 B.C.R. 246 (S.C. 1944) [1946] 1 W.W.R. 78 (B.C.S.C.) [1950] 4 D.L.R. 685 (B.C.S.C.) 21 D.L.R. (2d) 58 (B.C.S.C. 1960) 24 D.L.R. (2d) 737 (B.C.C.A. 1960) 31 D.L.R. (2d) 441 (B.C.S.C.) 65 CLLC P. 14,045 (B.C.S.C.)
1 to 2 years	4	29 O.R. 598 (C.A. 1897) [1943] 4 D.L.R. 441 (Alta. C.A.) [1946] 4 D.L.R. 114 (B.C.S.C.) 26 D.L.R. (2d) 678 (B.C.S.C. 1960)
2 to 3 years	3	[1925] 3 D.L.R. 841 (P.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1958] O.W.N. 217 (C.A.)
3 to 4 years	2	26 W.W.R. (n.s.) 546 (B.C.S.C.) [1961] S.C.R. 682
6 to 7 years	1	[1951] 3 D.L.R. 641 (P.C.)
9 to 10 years	2	[1957] S.C.R. 436 [1958] Que. Q.B. 709 (C.A.)

The following cases are not classified: 74 Que. S.C. 286 (1935); 48 Rev. Leg. (n.s.) 51 (1938); [1948] Que. K.B. 671; [1950] Que. K.B. 622; [1954] Que. S.C. 309.

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

TABLE XVII

DISTRIBUTION OF DISCIPLINARY (EXPULSION) CASES

BY FINAL COURT *

COURT	NO. OF CASES	CITATION
Trial Court	15	74 Que. S.C. 286 (1935) 48 Rev. Leg. (n.s.) 51 (Que.S.C. 1938) [1944] 4 D.L.R. 775 (B.C.S.C.) 60 B.C.R. 246 (S.C. 1944) [1946] 1 W.W.R. 78 (B.C.S.C.) [1948] Que. K.B. 671 [1950] Que. K.B. 622 26 W.W.R. (n.s.) 546 (B.C.S.C. 1958) 21 D.L.R. (2d) 58 (B.C.S.C. 1960) 26 D.L.R. (2d) 678 (B.C.S.C. 1960) 31 D.L.R. (2d) 593 (Ont. S.C. 1961) 65 CLLC P. 14,045 (B.C.S.C.) 65 CLLC P. 14,095 (B.C.S.C.) 65 CLLC P. 14,092 (B.C.S.C.) 65 CLLC P. 14,139 (B.C.S.C.)
Court of Appeal	6	29 O.R. 151 (1897) [1943] 4 D.L.R. 441 (Alta. C.A.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1958] O.W.N. 217 (C.A.) [1958] Que. Q.B. 709 (C.A.) 24 D.L.R. (2d) 737 (B.C.C.A.)
Supreme Court of Canada	3	[1957] S.C.R. 436 [1961] S.C.R. 682 65 CLLC P. 14,117
Privy Council	2	[1925] 3 D.L.R. 841 (P.C.) [1951] 3 D.L.R. 641 (P.C.)

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

body) to fit the needs of this area. The typical union now involved in litigation would appear to be on the small side (see Table XVIII) and from Quebec or British Columbia (see Table XIX). This is not fertile soil for such a venture.

The choice, then, is between the first and third possibilities. If one selects a labour relations board, one must answer the argument that such a move would compromise the boards' position as impartial arbiters of unions and management 99/ and the more telling point that their expertise does not well suit them for union-member disputes. Consequently, there is much merit in rejecting this position.

The suggestion that questions of union discipline be subject to something akin to a grievance procedure was made by Professor Williams. 100/ He argued that courts were unsuited for this problem and that the arbitration was because it offered more flexibility. Professor Summers has disagreed 101/, stating that the courts' record was fairly good and that with slight modifications it could work. 102/ He also felt that the concept of "just cause" which is implicit in the use of arbitration would be too vague when separated from the guidelines provided by the collective agreement. 103/ This latter argument seems to overlook the fact that "just cause" would be worked out by such boards 104/ and so Williams' position still has merit.

The problems raised, however, might be resolved by use of an arbitration process manned by a special branch of a labour relations board. 105/ This would not jeopardize the board's position of impartiality; it would be inexpensive and speedy; and would permit the development of a clearly-articulated theory of "just cause" in this area.

TABLE XVIII
UNION INVOLVEMENT IN DISCIPLINARY
(EXPULSION) LITIGATION*

UNION	NO. OF CASES	CITATION
Seafarers' Int. Union	5	21 D.L.R. (2d) 58 (B.C.S.C. 1960) 24 D.L.R. (2d) 737 (B.C.C.A. 1960) 26 D.L.R. (2d) 678 (B.C.S.C. 1960) 31 D.L.R. (2d) 441 (B.C.S.C. 1961) [1961] S.C.R. 682
Boilermakers' and Iron Shipbuilders Union of Canada	3	[1944] 4 D.L.R. 775 (B.C.S.C.) [1946] 1 W.W.R. 78 (B.C.S.C.) [1951] 3 D.L.R. 641 (B.C.S.C.)
Int. Assn. of Bridge, Structural & Orna- mental Ironworkers	2	65 CLLC P. 14,045 (B.C.S.C.) 65 CLLC P. 14,095

Fourteen other unions were involved in one case: Am. Bldg. Workers of Can.: 60 B.C.R. 246 (B.C.S.C. 1944); Assn. Int. des Débardeurs: 66 CLLC P. 14,117 (Que. C.A.); Assn. de Taxis La Salle: [1950] Que. K.B. 622; Can. Nat. Printing Trades U.: [1943] 4 D.L.R. 441 (Alta. C.A.); Cargo and Gangway Watchmen's U.: [1953] 1 D.L.R. 327 (N.B.C.A.); Fed. Assn. of Letter Carriers of Can.: [1958] O.W.N. 217 (C.A.); Bro. Ry. Car Workers of Am.: [1958] Que. Q.B. 709; Int. Bro. Teamsters: [1957] S.C.R. 436; I.B.E.W.: 26 W.W.R. (n.s.) 546 (B.C.S.C. 1958); Journeymen Stonecutters Assn. of N.A.: 29 O.R. 151 (1897); Order of Ry. Conductors: [1925] 3 D.L.R. 841 (P.C.); Plumbers and Electricians U. of Que.: 74 Que S.C. 286 (1935); U. Nat. Catholique des Boulangers: 48 R.L. (n.s.) 51 (1938); U. des Lambrisseurs de Navires: [1948] Que. K.B. 671.

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

TABLE XIX

DISTRIBUTION OF DISCIPLINARY (EXPULSION)

CASES BY PROVINCE *

PROVINCE	NO. OF CASES	CITATION
British Columbia	13	[1944] 4 D.L.R. 775 (B.C.S.C.) [1944] B.C.R. 246 (S.C.) [1946] 1 W.W.R. 78 (B.C.S.C.) [1951] 3 D.L.R. 641 (P.C.) 26 W.W.R. (n.s) 546 (B.C.S.C. 1958) 21 D.L.R. (2d) 58 (B.C.S.C. 1960) 24 D.L.R. (2d) 737 (B.C.C.A. 1960) 26 D.L.R. (2d) 678 (B.C.S.C. 1960) 31 D.L.R. (2d) 441 (B.C.S.C. 1961) 65 CLLC P. 14,045 (B.C.S.C.) 65 CLLC P. 14,092 (B.C.S.C.) 65 CLLC P. 14,095 (B.C.S.C.) 65 CLLC P. 14,139 (B.C.S.C.)
Quebec	7	74 Que. S.C. 286 (1935) 48 Rev. Leg. (n.s.) 51 (Que. S.C.1938) [1948] Que. K.B. 671 (S.C.) [1950] Que. K.B. 622 (S.C.) [1958] Que. Q.B. 709 (C.A.) [1961] S.C.R. 682 65 CLLC P. 14,117 (Can. S.C.)
Alberta	2	[1925] 3 D.L.R. 841 (P.C.) [1943] 4 D.L.R. 441 (Alta. S.C.)
Ontario	2	29 O.R. 151 (C.A. 1897) [1958] O.W.N. 217 (C.A.)
Manitoba	1	[1957] S.C.R. 436
New Brunswick	1	[1953] 1 D.L.R. 327 (N.B.C.A.)

* Prepared from material in McAllister and Petrie, Background Notes, for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

REFERENCES

- 1/ See Aaron and Komaroff, Statutory Regulation of Internal Union Affairs, 44 Ill. L. Rev. 425, 631, at 425 (1949), where it is stated:
"...[T]he arbitrary denial of admission to membership or work to the serious detriment of employees without actually costing them their jobs; and the arbitrary expulsion from union membership, even if it does not occasion the discharge of the expelled member, can undermine the democratic structure of the union."
- 2/ E.g., Rigby v. Connol, 14 Ch. D. 482, at 487 (1880), per Jessel, M.R. For an excellent criticism of this approach see Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, at 1056-1058 (1951).
- 3/ See, e.g., Kuzych v. White, [1950] 4 D.L.R. 187 (B.C.C.A.); Stephen v. Stewart, [1944] 1 D.L.R. 305 (B.C.C.A.); and Loc. 1571, I.L.A. v. I.L.A., [1951] 3 D.L.R. 50 (N.B.S.C., Ch. Div.).
- 4/ See Hickling, Right to Membership of a Trade Union, [1967] U.B.C. L. Rev. 243, at 253: "However, it is now clearly established that where a person stands in a contractual relationship with an association the courts will protect him not only by the award of damages, but also by giving a declaration as to the meaning or validity of rules and an injunction in support."
- 5/ Summers, supra, ref. 2, at 1058. Criticism of the contract theory by a Canadian writer may be found in Stone, Wrongful Expulsion from Trade Unions: Judicial Intervention in Anglo-American Law, 34 Can. Bar Rev. 1111, at 1115 (1956).
- 6/ Faramus v. Film Artistes Assn., [1963] 1 All E.R. 636 (C.A.); see also Frank, Casenote, [1963] J. Bus. Law 280; Rideout, Casenote, 26 Mod. L. Rev. 436 (1963). This case is discussed in Chapter III.
- 7/ For an excellent discussion of the development of the basis of union membership from contract to status, see Chafee, The Internal Affairs of Associations not for Profit, 43 Harv. L. Rev. 993 (1930); cf. Lloyd, Casenote, 36 Can. Bar Rev. 83, at 89 (1958): "One cannot but regret the seeming inability of the common law hitherto to develop a new conception of legal relationship arising out of membership of an association, whether purely unincorporated or not, and to treat deprivation of that relationship as in itself a substantive tort, rather than engaging in the dubious talk of trying to force this relationship into the framework of some established category, such as contract or status, which it does not really fit."
- 8/ This point is discussed at length by Judson, J. in Syndicat Catholique des Employés de Magasins de Québec, Inc. v. Compagnie Paquet Ltée., 18 D.L.R. (2d) 340 (Can. S.C.).

- 9/ See, however, the comments of Hoskin, J. in Gould v. Wellington Waterside Workers, [1927] N.Z.L.R. 1024, where he stated that closed shop agreements gave members a status with respect to such privileged employment, the destruction of which was a tort.
- 10/ [1957] S.C.R. 436; var'ing [1955] 3 D.L.R. 15 (Man. C.A.); var'ing [1953] 4 D.L.R. 407 (Man. Q.B.)
- 11/ See Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, at 619 (1959). Stone, supra, ref. 5, at 1138.
- 12/ [1955] 3 D.L.R. 15, at 39. For a discussion of this case at the C.A. level see Carrothers, Casnote, 34 Can. Bar Rev. 70 (1956); Whitmore, Casnote, 34 Can. Bar Rev. 188 (1956).
- 13/ [1957] S.C.R. 436, at 444-445.
- 14/ See the Bibliography for the collected casenotes. Also this case was the basis for articles by Whitmore, Stone and Lloyd.
- 15/ See Lenhoff, The Right to Work: Here and Abroad, 46 Ill. L. Rev. 669, at 697 (1951).
- 16/ See supra, ref. 9.
- 17/ Other than the proprietary, contractual, and status tort bases there are other theories related to the basis of intervention. The principal one, of course, is that of the "right to work" discussed earlier in relation to exclusion problems. Those same arguments are applicable here also.
- 18/ E.g., Lenhoff, supra, ref. 15, at 696-697, claims that in France and Switzerland, using the contract theory, courts have held that a condition of the monopoly held by a union is that it accepts employees for which it bargains as members. Note also that the Donovan Commission expressly and impliedly accepted the contract theory: "Para. 625. The foundation of a member's rights vis-à-vis the union is the contract between himself and his fellow members whereby he agrees to join the union and to observe its rules. The detail of the contract is thus to be found in the rule-book of the union...."
- 19/ See, e.g., Crawford and Stone, Casnote, 36 Can. Bar Rev. 97 (1958); Carrothers, Collective Bargaining Law in Canada (1965), pp. 527-537, at 528 where the author states that the "...proposition would appear to be one of interpretation, not a rule of law."
- 20/ Although the rule is firmly established in England by Annamuthodo v. Oilfield Workers Union, [1961] A.C. 945 (P.C.), certain recent developments have raised the question whether this rule is absolute in its application where the obligation to exhaust is not expressly included in the union constitution: Lawlor v. Union of Post Office Workers, [1965] 1 All E.R. 353, at 363: "The Privy Council thus seems to have been of the opinion that, in the absence of express provision to the

contrary, a right of appeal to a domestic tribunal does not preclude resort to the courts before exercising that right." For a discussion of the latter case see Rideout, Comment, 28 Mod. L. Rev. 351 (1965); Rideout, Admission to Non-Statutory Associations Controlling Employment, 30 Mod. L. Rev. 389, at 390 (1967).

- 21/ See, e.g., Field v. Court Hope, 26 Gr. 467 (1879); Essery v. Court Pride of the Dominion, 2 O.R. 596 (1883). For an excellent analysis of this doctrine in Canadian law see Stone, supra, ref. 5, esp. at 1125-1128. Again, a general review of the legal limitations placed on a union's right to expel a member is found in Lloyd, The Right to Work, 10 Curr. Leg. Prob. 36 (1957).
- 22/ See Cox, supra, ref. 11, at 651.
- 23/ The trenchant phrase of Younger, L.J. in Braithwaite V. Am. Soc. of Carpenters, 91 L.J. Ch. 55, at 68 (1922).
- 24/ [1951] 3 D.L.R. 641 (P.C.); rev'ing [1950] 4 D.L.R. 187 (B.C.C.A.); and [1949] 4 D.L.R. 662 (B.C.S.C.). This case has become a leading authority in this area of the law, being widely used by common law courts: see, e.g., Tharmalingnam v. Sambathan, 27 M.L.J. 63 (Malayan C.A. 1961); and discussed by writers: see, e.g., Whitmore, Casenote, 30 Can. Bar Rev. 525 (1952).
- 25/ Kuzych v. Stewart, [1944] 4 D.L.R. 775 (B.C.S.C.).
- 26/ See Morris, J. in Jurak v. Cunningham (No. 1), 20 D.L.R. (2d) 377, at 380 (B.C.S.C. 1959): "...[T]he tendency of the Courts is, where possible, to avoid extending the application of the judgment of the Privy Council in White v. Kuzych beyond the narrow grounds of the facts in the case." For a similar view, see Whitmore, Casenote, 30 Can. Bar Rev. 617, at 622 (1952).
- 27/ One should note that the U.S. Congress tried to give this sphere more clarity by including s. 101(4) in the Landrum-Griffin Act (L.M.R.D.A.). Instead, the position became even more clouded with the conflict over the permissive "may". See Ryan v. Int'l Bhd. of Electrical Workers, 360 F. (2d) 315 as discussed in 35 Geo. Wash. L. Rev. 848 (1967). Industrial Union of Maritime Workers v. N.L.R.B., 379 F. (2d) 702 (3rd Cir. 1967) as discussed in 13 Vill. L. Rev. 429 (1968); 21 Vand. L. Rev. 157 (1967); 52 Minn. L. Rev. 1126 (1968).
- 28/ This exception is based on the application to trade unions of the traditional rules of ultra vires found in cases such as Murray v. Johnstone, 23 R. 981 (Ct. Sess. 1896); Am. Soc. of Ry. Servants v. Osborne, [1910] A.C. 87 (H.L.); and Stanishewski v. Tkachuk, [1955] 4 D.L.R. 517 (Ont. S.C.). For its application in the case of a Canadian trade union see: McRae v. Loc. 1720, Cargo and Gangway Watchmen's Union of the Port of St. John, N.B. (I.L.A.), [1953] 1 D.L.R. 327 (N.B.S.C., App. Div.). On this latter case, see Whitmore, supra, ref. 24.

For examples of provisions in union constitutions dealing with discipline, see infra and Clawson, Union Security Clauses and the Right to Work, 30 Can. Bar Rev. 137 (1952).

- 29/ See, e.g., Abbott v. Sullivan, [1952] 1 All E.R. 226 (C.A.); Hendry, Casenote, 30 Can. Bar Rev. 844, esp. at 845 (1952).
- 30/ Lee v. Showmen's Guild of G.B., [1952] 1 All E.R. 1175, at 1180 (C.A.), per Lord Denning L.J. See also Whitmore, supra, ref. 26.
- 31/ See, e.g., Morris J. in Jurak v. Cunningham (No. 1), supra, ref. 23, at 380: "A distinction has been made in these cases [Tunney and Bimson v. Johnston, 10 D.L.R. (2d) 11 (Ont. S.C. 1957); aff'd. 12 D.L.R. (2d) 379 (Ont. C.A. 1958)] between the facts in the Kuzych case on the one hand where there was not a lack of jurisdiction, the domestic tribunal having entered upon the hearing the members acting improperly and showing bias or prejudice, and on the other hand the cases in which the facts were that the decision was made without jurisdiction at all and the decision complained of was a mere nullity, there having been no charge or proper notice of a hearing given to the person charged or something of that sort."
- 32/ Carrothers, supra, ref. 19 at 528, 537.
- 33/ Orchard v. Tunney (1955), 15 W.W.R. 49 (Man. C.A.) at 53 per Adamson C.J.; Gee v. Freeman (1958), 26 W.W.R. 546 (B.C.) per Wilson, J.
- 34/ McRae case, supra, ref. 28. Cf., however, Viscount Simon in White v. Kuzych, [1951] 3 D.L.R. 641 (P.C.), where he states at 648: "...[I]s the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or on the contrary, is it simply void and thus not subject to appeal at all?"
- 35/ Ashbury Ry. Carriage and Iron Co. v. Riché, 33 T.L.R. 450 (H.L. 1875).
- 36/ Jurak v. Cunningham (No. 2), 20 D.L.R. (2d) 381 (B.C.S.C. 1959). See also Dixon, J. in Australian Workers Union v. Bowen No. 2, 77 C.L.R. 601, at 631-632 (Aust. H.C. 1948).
- 37/ Abbott case, supra, ref. 29.
- 38/ The outstanding example of this in Canada is the Tkachuk case, supra, ref. 28, where Spence, J. applied the ultra vires doctrine to a club incorporated under the Ontario Corporation Act in face of a Court of Appeal decision which stated that this rule does not apply in Ontario. The court's reasons are both clear and laudable: it is more important to restrain the activities of a group whose sole interest in membership is the furtherance of the interests expressed in the document being interpreted than it is in commercial institutions where the overwhelming interest of membership is profit no matter how gained.

- 39/ E.g., Saunders v. Billingsley, [1950] 4 D.L.R. 685 (B.C.S.C.).
- 40/ E.g., S.I.U. v. Stern, 29 D.L.R. (2d) 29 (Can. S.C. 1961); aff'ng [1960] Que. K.B. 901.
- 41/ See, e.g., Wilson, J. in Jurak v. Cunningham (No. 3), 21 D.L.R. (2d) 58, at 62 (B.C.S.C. 1959): "Thus, these union tribunals are accorded, by contract, a freedom from supervision by the Courts which is withheld from statutory tribunals, where the submission of the complainant arises from the social contract to which all citizens must be held to have subscribed."
- 42/ Supra, ref. 30, at 1180.
- 43/ For an extra-curial pronouncement indicating a desire to see union activity relating to union security closely circumscribed, see the article by this eminent jurist: A British View of "Right to Work" Laws, U.S. News & World Report, 16 Sept. 55, at 142. This article sheds light on his decisions in the above and other cases involving union security. See, e.g., the Faramus case, supra, ref. 6, and Boulting v. A.C.T.A.T., [1963] 1 All E.R. 716 (C.A.).
- 44/ See de Smith, Judicial Control of Administrative Action (1959), esp. at 101 et seq.
- 45/ "If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision can always seek redress in the courts. It is prejudicial to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside." Per Lord Denning in Annamunthodo v. O.W.T.U., [1961] 3 All E.R. 621, at 625 (P.C.). Cf., however, Dunfield, J. in Cantwell v. Nfld. Labourers Union, 29 D.L.R. (2d) 217, at 226-227, (Nfld. S.C. 1961); and Australian Workers Union v. Bowen (No. 2), supra, ref. 36; Note, 35 Aust. Law J. 450 (1962).
- 46/ Bimson v. Johnston, supra, ref. 31; and the Cantwell case, ibid. For an example of a "kangaroo court", see L'Association Int. des Débardeurs, Loc. 375 v. Lelievre, 52 D.L.R. (2d) 573 (Que. C.A. 1965); aff'ng [1964] Que. S.C. 507.
- 47/ Kennedy v. Gillis; Gillis v. Smith & Kennedy, 30 D.L.R. (2d) 82 (Ont. S.C. 1961).
- 48/ Supra, ref. 30.
- 49/ E.g., Dawkins v. Antrobus, 17 Ch. D. 615 (1881); MacLean v. The Workers' Union, [1929] 1 Ch. 602; cf. Andrews v. Mitchell, [1905] A.C. 78 (H.L.); Wayman v. Perseverance Lodge, [1917] 1 K.B. 677.
- 50/ Kennedy case, supra, ref. 47.
- 51/ Ibid.

- 52/ Orchard v. Tunney, supra, ref. 10. Under the above analysis this is all that remains of the "exhaustion of remedies" doctrine.
- 53/ Gee v. Freeman, 16 D.L.R. (2d) 65 (B.C.S.C. 1959).
- 54/ Ibid.
- 55/ Ibid.
- 56/ Ibid.
- 57/ Hughes v. S.I.U., 31 D.L.R. (2d) 441 (B.C.S.C. 1961).
- 58/ Gee case, supra, ref. 53. This requirement is potentially fraught with difficulty of application: "judges" in these cases are often the accusers. Thus, applying this rule would in most cases invalidate the hearings. To avoid this and to prevent statutory regulation there have been some attempts by unions to turn this process over to impartial third persons. No doubt this problem of bias influenced Sidney Smith, J.A., in White v. Kuzych, supra, ref. 24, at 197, to quaere whether in all expulsion cases the accused should not have immediate access to the courts.
- 59/ Supra, ref. 40.
- 60/ "It is doubtful that a trade union could attribute to itself the power to coerce, by threats of suspension of the right to obtain work, its present or future members— who are virtually forced to maintain union membership to obtain employment—, to boycott third parties in the exercise of their calling, for reasons and in circumstances such as are present in this case." Per Fauteux, J. at 33-34.
- 61/ Ibid. See also Huntley v. Thornton, [1957] 1 All E.R. 234 (Ch. Div.); Greenfield, Casenote, 20 Mod. L. Rev. 495 (1957).
- 62/ On this point see the comment of LaBrie and Palmer, Cases and Materials on Company Law (1961), at 85-87.
- 63/ See, e.g., the comments in Chapter II on the effect of union security legislation on dual unionism. Cf. Jurak v. Cunningham (No. 3), supra, ref. 41.
- 64/ See, e.g., Rookes v. Bernard, [1961] 2 All E.R. 825, [1964] A.C. 1129; Morgan v. Fry, [1967] 2 All E.R. 386 (Q.B.); and Wedderburn, The Right to Threaten Strikes, 29 Mod. L. Rev. 572 (1961).
- 65/ Brady v. Heinekey and Black Ball Ferries, 24 D.L.R. (2d) 737 (B.C.C.A. 1960).
- 66/ Jurak v. Cunningham (No. 1), supra, ref. 26.
- 67/ Kuzych v. Stewart, supra, ref. 22. In this respect the remedy has been widened by most courts by not requiring the unjustly expelled member to

mitigate damages (ibid.) or giving punitive damages and thus side-stepping the issue: White v. Kuzych, supra, ref. 24.

- 68/ The Combination Law and Opinion, 17 Harv. L. Rev. 511, at 513 (1904). Recognition of this fact was also shown in a debate in the English House of Commons when Prime Minister Balfour answered a lawyer in the opposition benches who corrected Balfour's use of the word "corporation" in relation to a trade union: "I know; [but] I am talking English, not law."
- 69/ Taff Vale Ry. Co. v. Am. Soc. of Ry. Servants, [1901] A.C. 426 (H.L.).
- 70/ The U.S. Courts have taken a similar position: U.M.W. v. Coronado Coal Co., 259 U.S. 344 (1922).
- 71/ There were some attempts to introduce entity in this area, but they were, for the most part, overlooked. See, e.g., N.U.G. & M.W. v. Gillian, [1946] K.B. 81, at 87 (C.A.), per Uthwatt J.
- 72/ [1955] 3 All E.R. 518 (H.L.); rev'ng in part [1954] 1 All E.R. 822 (C.A.). This case caused a furor in academic circles. For notes on this case, see: Lloyd, Casenote, 17 Mod. L. Rev. 360 (1954); Montrose, Casenote, 17 Mod. L. Rev. 462 (1954); Cooke, Casenote, 17 Mod. L. Rev. 574 (1954); Thomas, Casenote, [1954] Camb. L.J. 162; Goodhart, Casenote, 70 L.Q. Rev. 322 (1954); and Carrothers, Casenote, 34 Can. Bar Rev. 70. See also the articles by Lloyd and Wedderburn, infra, ref. 73.
- 73/ In the Court of Appeal, Denning, J. was sure on this point: "A trade union is an entity with a personality in law comparable to that of a corporation. It is not, perhaps, an entire corporation, but it has many of the attributes of one. ... I take it to be clear, however, that a trade union is an entity in fact [at p. 836]." The House of Lords, however, took a far less straightforward approach. See the latter's views analysed by Lloyd, Damages for Wrongful Expulsion from a Trade Union: Bonsor v. Musicians' Union, 19 Mod. L. Rev. 121 (1956); and Wedderburn, The Bonsor Affair: A Postscript, 20 Mod. L. Rev. 105 (1957).
- 74/ Comtois v. L'Union Locale 1552 des Lambrisseurs de Navires, [1948] Que. K.B. 671 (C.A.). See Spector, Note, 27 Can. Bar Rev. 217.
- 75/ See, e.g., In re Patterson and Nanaimo Dry Cleaning and Laundry Workers Union, Loc. No. 1, [1947] 2 W.W.R. 510 (B.C.C.A.).
- 76/ Anglo-Newfoundland Development Co. v. I.W.A., Loc. 2-254, 17 D.L.R. (2d) 766 (Nfld. S.C. 1959).
- 77/ Supra, ref. 10. This view may well have been ill-founded; fortunately, later developments rendered it unnecessary to have the Court refine its views on this point.
- 78/ I.B.T. v. Therien, 22 D.L.R. (2d), (Can. S.C. 1960); aff'ng 16 D.L.R. (2d) 646 (B.C.C.A. 1959); aff'ng 13 D.L.R. (2d) 347 (B.C.S.C. 1958).

- 79/ Ibid., at 11.
- 80/ E.g., in relation to unions covered by Ontario legislation: The Rights of Labour Act, R.S.O. 1960, c. 354, s. 3. Even here, perhaps, this legislation will be whittled down. See Re Polymer Corp., 33 D.L.R. (2d) 124 (Can. S.C. 1961); aff'ng 28 D.L.R. (2d) 81 (Ont. C.A. 19); aff'ng 26 D.L.R. (2d) 609 (Ont. S.C. 1961). The effect of this legislation is discussed in Chrysler, Actions by or against Trade Unions in Ontario, 39 Can. Bar Rev. 30 (1961).
- 81/ Dussessoy's Supermarkets St. James v. Retail Clerks Union Loc. 832, 30 D.L.R. (2d) 50 (Man. Q.B. 1961); cf. Re Bakery and Confectionery Workers Int. Union, Loc. 389, and Brothers Bakery, 37 W.W.R. (n.s.) 413 (Man. Q.B. 1961).
- 82/ Boldt v. S.I.U., 26 D.L.R. (2d) 678 (B.C.S.C. 1960). This case was followed in Hughes v. S.I.U., supra, ref. 57, which said that the Boldt and Therien cases overruled all old cases on entity such as Jurak v. Cunningham (No. 3), supra, ref. 41.
- 83/ For an analysis of this change, see Lloyd, Unincorporated Associations (1938), at 128-129.
- 84/ Pramatha Nath Mullick v. Pradyumna Kamar Mullick, L.R. 52 Ind. App. 245 (P.C. 1925).
- 85/ Sylvestre v. Finch, 29 Que. P.R. 226 (S.C. 1926). The Quebec Amateur Hockey Association was the group in question.
- 86/ Morrison v. Standard Bldg. Assn., [1932] A.D. 229 (U. So. A.S.C., App. Div.).
- 87/ For an excellent analysis of these arguments, see Goodhart, The Legal Personality of a Trade Union, 70 L.Q. Rev. 322 (1954).
- 88/ For arguments in favour of such legislation, see Wedderburn, supra, ref. 73, at 123.
- 89/ E.g., the British Columbia Trade-unions Act, R.S.B.C. 1960, c. 384, s. 7.
- 90/ See the author's articles: The Impact of Union Security in Canada, 13 Buff. L. Rev. 515 (1964); Union Security and the Individual Worker, 15 U. Tor. L.J. 336 (1964); and Protection of the Freedom of Individual Workers in Canada, 3 West. Ont. L. Rev. 166 (1964).
- 91/ Thomas, Trade Unions and Their Members, [1956] Camb. L.J. 67. See at 69 where he states: "...[T]he successful plaintiff may well find in them [judicial rules] all the remedy he needs; for these should speedily restore him to the enjoyment of his membership, at any rate until the union, through its proper agencies and for proper reasons, chooses to expel him in strict accordance with the rules."

- 92/ See Cox, supra, ref. 11, at 615; and Aaron and Komaroff, supra, ref. 1, at 667-668.
- 93/ Lloyd, Judicial Review of Expulsion by a Domestic Tribunal, 15 Mod. L. Rev. 412 (1952).
- 94/ On this point, see Smythe, Schwab and Madigan, Individual's Procedural Rights in Union Disciplinary Action, 17 Lab. L.J. 226 (1966).
- 95/ "Nor is the possibility of legislative intervention a decisive substitute for judicial development; for not only may the legislature be preoccupied with other more pressing affairs but the subject-matter itself may be unsuitable for statutory treatment. It is particularly in such a field as the present, where legislation is improbable but if enacted is likely, by an over-rigid approach, to do more harm than good, that the development of the common law may prove the most suitable means of reaching a satisfactory solution." Lloyd, Casenote, 36 Can. Bar Rev. 83, at 95 (1958).
- 96/ This is discussed in Smythe, supra, ref. 94, at 226.
- 97/ Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951).
- 98/ On this topic, see Oberer, Voluntary Impartial Review of Labor—Some Reflections, 58 Mich. L. Rev. 55 (1959); and Public Review Boards: A Check on Union Disciplinary Power, 11 Stan. L. Rev. 497 (1959).
- 99/ See Aaron and Komaroff, supra, ref. 1, at 667-668.
- 100/ Williams, The Political Liberties of Labor Union Members, 32 Tex. L. Rev. 826 (1954).
- 101/ Summers, The Political Liberties of Labor Union Members—A Comment, 33 Tex. L. Rev. 603 (1955).
- 102/ Ibid., at 604-610.
- 103/ Ibid., at 610-614.
- 104/ See this rebuttal made in Williams, The Political Liberties of Labor Union Members—In Conclusion, 33 Tex. L. Rev. 617 (1955).

CHAPTER V

THE AMBIT OF ENFORCEABLE UNION DECISIONS

INTRODUCTION

In the previous chapter procedural limitations on union disciplinary action were studied. In the course of this review it was pointed out that, generally, unions could set any provisions for discipline in their constitutions they wished. This rule was circumscribed by the single criteria that such provisions could not infringe any law of general application or, as happened occasionally, was not permitted to breach public policy as found by the courts. 1/ The same rules apply to any provision placed in a union's constitution.

A continuance of this position is both untenable and intolerable. The union of today, aided by legislative intervention, makes decisions of great importance for the persons it represents. Thus, due to this state assistance and to the union's consequent control of job opportunities, such attempts at regulation as do exist do little to limit the scope of union action, with the result that some rectification would seem advisable. 2/

In so doing, however, care must be taken not to go too far in the direction of intervention. Naturally, one reason for this is the traditional distaste of unions for outside interference in its internal affairs. 3/ As Professor Kahn-Freund has said 4/, one of the chief characteristics of the international trade union movement is "its aversion to legislative intervention, its disinclination to rely on legal sanctions, its almost passionate belief in the autonomy of industrial forces." More important, however,

is the necessity to avoid excessive intervention which will dull the enthusiasm of members of the union for self-improvement. Consequently, suggestions in this area will, of necessity, be minimal.

Parenthetically, it should be pointed out that the major remedy for a union acting outside its constitution—the ultra vires action—has been discussed in the last chapter. For this reason it will not be dealt with again.

This chapter is divided into three sections: (i) valid union decisions regarding disciplinary action; (ii) the extent to which unions should be involved in political activity; and, (iii) the extent to which unions must make decisions that do not discriminate between its members.

Valid Decisions Relating to Discipline

Before looking at the methods of limiting union decisions in this area, it is interesting to note the grounds union constitutions provide for discipline. Consequently, Table XX has been drawn up to indicate the offenses found in the constitutions studied. In considering these offences, one must be constantly aware that such documents are so overlaid with custom and reshaped by institutional forces that the words may fail to reveal how the rules are actually applied in practice. 5/

As can be seen from Table XX, each constitution identifies a number of specific offenses, among which the variations are numerous because of the differences in emphasis. These prohibitions, normally scattered throughout the constitution, range from the simple to the elaborate. In only three smaller unions was there no provision of specific grounds—the ability to establish such grounds as it desired would be regarded as a normal power of a union.

TABLE XX

PREVALENCE OF SELECTED OFFENCES PUNISHABLE UNDER NATIONAL
AND INTERNATIONAL UNION CONSTITUTIONS

Offences	No. of Unions	No. of * Members
All constitutions providing grounds	47	923
Violation of the constitution and union laws generally	46	918
Non-payment of financial obligations	41	865
Misappropriation of union funds	34	651
False charges	32	749
Failure to exhaust internal remedies	30	690
Dual Unionism	29	675
Succession	27	524
Conduct detrimental to the union	23	316
Strikebreaking	20	293
Obtaining membership by fraud or misrepresentation	15	348
Member or supporter, etc., of Communism or similar organization	12	114
Disclosure of union secrets	12	294
Conduct unbecoming a member	11	223
Interference with union officers	11	232
Interference with fair elections	10	252
Unauthorized use of union name	7	259
Drunkenness	5	81

* In thousands

Every constitution but one that contained a reference to grounds for discipline provided at least one "catchall" prohibition that did not explicitly define the type of behaviour outlined. In practice, however, certain of these general provisions tend to be as definite and precise as any specific prohibition. Thus, the offense most often included, "violation of the constitution", could be defined by reference to specific constitutional provisions. Other general provisions such as "conduct unbecoming a member" or "bringing the union into disrepute" are of a more nebulous character. Even in this latter group, however, there are often sub-provisions of such a nature as to foster some degree of specificity. Further, those rules that relate to "natural justice" compel the inclusion of more specific charges 6/, as might the trial provisions in the constitution involved. 7/ Thus, although these general clauses might seem overly vague, the disciplinary procedure in its entirety generally will serve to inhibit the imposition of penalties for indefinite reasons. It is interesting to note, as well, that those offences mentioned above have been the subject of litigation more than any other type of clause, including that of dual-unionism, and that the courts have treated plaintiffs in such cases well (Table XXI).

Other specific offenses can be grouped for more convenient study: 8/

Financial. The custody and control of union funds and property was regulated in at least 41 union constitutions. Generally, such provisions dealt with either non-payment of money owed the union or misappropriation or defrauding union funds. In the latter case, it was typically an offense by an officer of the union. Such clauses seem to have given rise to no litigation and need not be dealt with by the Task Force.

Union Loyalty. Union constitutions were most explicit in denouncing conduct that threatened the continued existence of the union. The activity that was proscribed included the failure to exhaust internal remedies, dual-unionism, secession, strike breaking, and disclosure of union secrets. In a general sense, "conduct detrimental to the union" covers all these topics.

Two of the most commonly referred to offenses in this category were dual unionism and secession. Dual unionism usually refers to the act of joining or favouring a union which claimed rival jurisdiction, while secession usually refers to the act of withdrawing from the union. In many constitutions, however, the distinction between these terms was not entirely clear, and in a few they seemed to be used as synonyms.

Table XXI indicates that this type of offense has formed the basis for most of the litigation in this area. Consequently, this area merits more detailed consideration. Such consideration, however, is restrained to a discussion of those changes that were suggested with respect to union security and their relation to the topic presently under discussion.

Given this latter restriction, one need not worry about the person who acts against the bona fide best interests of the union—he still will have his job. The issue that creates the most concern arises when a person opposes union policies, not with a view to oppose the union as such, but merely to attempt to have the union alter its policies. Such action would seem to be desirable in that it would tend to lessen corrupt practices by an entrenched union executive. Unfortunately, present legislation, such as that of Ontario, does not protect such protestants even from the effect of union security clauses. 10/ Therefore, at the very least, this latter gap in the law should be closed. Further legislation should be promulgated to protect persons associated with "minority parties" within the union. 11/

TABLE XXI

ALLEGED GROUNDS OF DISCIPLINE IN LITIGATION INVOLVING EXPULSION OF

UNION MEMBERS: INCIDENCE AND RELIEF *

GROUNDS	NO. OF CASES	RELIEF	CITATION
Breach of Constitution	4	declaration dismissed damages-declaration injunction	[1946] 1 W.W.R. 78 (B.C.S.C.) [1958] Que. Q.B. 709 31 D.L.R. (2d) 441 (B.C.S.C. 1960) 65 CLLC P. 14,045 (B.C.S.C.)
Dual Unionism	4	dismissed dismissed damages-declaration injunction	[1943] 4 D.L.R. 441 (Alta. C.A.) 21 D.L.R. (2d) 58 (B.C.S.C. 1960) 26 D.L.R. (2d) 678 (B.C.S.C. 1960) 65 CLLC P. 14,045
Activity Detrimental to Union Interests	3	dismissed dismissed dismissed	29 O.R. 151 (C.A. 1897) [1951] 3 D.L.R. 641 (P.C.) 26 W.W.R. (n.s.) 547 (B.C.S.C. 1958)
Conduct Unbecoming Union Member	1	dismissed	[1951] 3 D.L.R. 641 (P.C.)
Criticism of Internal Management	1	declaration-injunction	[1958] O.W.N. 217 (C.A.)
Criticism of Internal Union Affairs	1	damages-declaration	[1957] S.C.R. 436
Disclosure of Union Secret	1	damages-mandamus	74 Que. S.C. 286 (1935)

TABLE XXI (Cont'd)

GROUND	NO. OF CASES	RELIEF	CITATION
Violation of Internal Directive	1	injunction	60 B.C.R. 246 (S.C. 1944)
Violation of Oath of Obligation	1	dismissed	[1951] 3 D.L.R. 641 (P.C.)
Violation of Union Policy	1	mandamus	[1961] S.C.R. 682

The following cases were not classified: 48 Rev. Leg. (n.s.) 51 (Que. S.C. 1938); [1944] 4 D.L.R. 774 (B.C.S.C.); [1948] Que. K.B. 671 (S.C.); [1950] Que. K.B. 622 (S.C.); and 24 D.L.R. (2d) 737 (B.C.C.A. 1962).

* Prepared from material in McAllister and Petrie, Background Notes for Industrial Relations Section of the Can. Bar Assn. Meeting, 2 Sept. 65, and Addendum.

In working out the terms of such legislation, not all aspects of what is called above "union loyalty" need be dealt with similarly. More specifically, the following considerations should apply:

(a) Strikebreaking: When a union strikes to win its bargaining demands, effective internal solidarity is particularly important. Consequently, many constitutions authorize disciplinary sanctions against such disloyalty, calling it "strikebreaking" or "union wrecking" and making it a specific offense.^{12/} Obviously, such clauses should be regarded as valid as long as the strike in question is a legal one.

(b) Disclosure of union secrets: Disclosing union secrets, considered another threat to internal security, was the subject of disciplinary action in 12 of the 50 union constitutions studied. Most clauses prohibit unauthorized disclosure of any confidential matter of the union, such as "secrets", "private transactions", or "business". There seems to be no reason to limit the union's freedom in this regard.

(c) Failure to exhaust internal remedies: Premature resort to civil courts, considered by some to be a flagrant display of disloyalty, was specifically prohibited in 30 constitutions. This has not been the subject of any litigation. In light of the discussion on procedures for discipline, however, it seems reasonable to preclude such provisions from union constitutions by declaring them unenforceable.

(d) Subversive Activity: Subversive activity, or support of groups declared to be subversive, was specified as a reason for disciplinary action in 12 union constitutions. These clauses nearly always identify the Communist Party ^{13/}; a few include Nazi and Fascist groups; others cover

communist-oriented unions by name; one goes as far as to include the National Association of Manufacturers. Apparently, such clauses have given rise to no litigation.

It is doubtful if such clauses should be permitted where the activity covered is not illegal in itself; however, some of the sections could be covered by the dual-unionism rule. What seems to be the difficulty is the use of union membership to limit a person's right to support a legal political party. Clearly, a union should not be able to do this, although such limitations might be considered valid in so far as they prevented a person from holding a union executive position. One might, however, consider difficulties arising from the espousal of a political party whose platform was violently anti-labour.

Electioneering: In 10 of the constitutions studied there were prohibitions in them regarding the types of activities that could be engaged in by union members during election campaigns. Some of these forbid slandering persons during a campaign. Such clauses border on the making of "false charges" found in 32 of the constitutions. This type of clause is an extremely dangerous one and has given rise to some litigation, the courts upholding the plaintiffs in both cases. It would be difficult, however, to frame legislation that would be adequate to deal with this problem.

Procedural irregularities in the conduct of elections is also covered, but it seems to be relatively innocuous and needing no intervention. 14/

Moral Prohibitions: Several constitutions attempt to regulate certain types of moral or ethical behavior: 11 make conduct unbecoming a member an offense; and 5 make drunkenness an offense. None of these cases have gone to the courts and there is no need for intervention here.

Miscellaneous: Certain housekeeping provisions are also found. Thus, 15 constitutions make obtaining membership by fraud or misrepresentation an offense and 7 treat unauthorized use of the union name similarly. Again, no intervention is needed here.

Penalty Provisions: Table XXII sets out the relevant provisions in union constitutions. It is sufficient to indicate that most of the constitutions considered merely provide for a fine, suspension or expulsion. 15/ Clearly, a broader range of penalties spelled out in constitutions would be desirable: it would at least bring the mind of the persons trying a member to the alternatives available. It is doubtful, however, if such intervention should be attempted.

Enforcement of Penalties: Of the 3 traditional methods of maintaining union discipline, only that of the fine has been rarely used, although it is included in a great majority of union constitutions. (See Table XXII). However, very recently a great amount of literature has appeared in the United States which has been precipitated by the Supreme Court decision of NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967). 16/ As the situation now stands, a state court is free to apply state law holding that a fine imposed under the union constitution creates an enforceable obligation. 17/ However, "substantial problems relating to the collection of these fines have not been settled". 18/ It is quite obvious that suspension or expulsion may be occasioned by a failure of the party to pay his fine 19/, although this would seem extreme when looked at in relation to the possible seriousness of the offence. This does not mean he will lose employment, for such a person is protected under the LMRA. The impact of the case is to be found more in the sense that: "...[A] union member cannot afford to defy union

TABLE XXII

PENALTY PROVISIONS, NATIONAL AND INTERNATIONAL UNION
CONSTITUTIONS

Penalty	No. of Unions	No. of * Members
All constitutions providing for penalties	48	934
Fine	45	931
Suspension	46	902
Expulsion	46	911
Reprimand or censure	24	415
Removal from office	20	453
Suspension from office	3	36
Disqualified from holding office	14	293
Refrain from doing certain acts	3	91
Limitation to hold office or attend meetings	1	16
Deprivation of privileges or benefits	1	16
Punishment as evidence warrants	2	14
Otherwise discipline	4	54
No provision for penalties	2	8

* In thousands

mandates; he now faces the direct economic sanction of a court-enforced fine.... [This] strengthens the union as an effective and orderly bargaining representative, by allowing the courts to enforce union fines on members." 20/ Although the decision was based on an interpretation of s. 8(b) (1) (A) LMRA, its impact has more general ramifications. One issue that does arise is the effect it will have on non-members who, of course, are members of the bargaining unit. Are they to be susceptible to discipline or not? The contract theory, that legal fiction on which the union-member relationship is based, does not cover non-members. Further questions may be raised as to the possibility of an arbitrary fine being imposed. 21/ Thus, in dealing with the problems, a balance must be found between the need for union discipline and that which cries out for protection of individual rights. 22/ The National Labour Relations Board (NLRB) has recently begun to apply a test related to the balancing of interest (union v. member) which, although complicated, seems workable. 23/ In essence, it balances five variables: 24/

1. the permissible objective of the union as related to the furtherance of union goals (solidarity);
2. the source of union power (security shop, etc.);
3. the means used to achieve the permissible objective (expulsion, suspension, fines, etc.);
4. the degree of invasion upon the members' rights (right to make decisions); and
5. the right of the member to be protected from coercion.

The application of this type of test in Canada may not be possible. Nonetheless, in dealing with a situation such as this, the alternatives are not juridical ones based on legal interpretation, but are choices that are realistic.

Unions and Political Action

The corporate involvement of unions in political affairs has always been resented in some quarters, the feeling being that this activity offended democratic notions by forcing individual union members to support political parties with which they might not agree. 25/ Although a person might have some initial sympathy with this position, it is clear that unions should not be precluded from taking part in the political arena. The reason for this has been made by many writers. For example, Professor Patrick has said: 26/

Politics and legislation have become of great importance to unions because of necessity rather than reflecting a statement of doctrinal position. Unions are brought into politics because their existence is defined by a legal and political system. A certain minimum of political activity is also necessary for unions to take part in collective bargaining on competitive terms with management.

Professor Reynolds is even more emphatic: 27/

It is often debated whether unions should go into politics; really, they have no choice in the matter. They are automatically in politics because they exist under a legal and political system which has been generally critical of union activities. The conspiracy suit and the injunction judge have been a problem for unions from earliest times. A minimum of political activity is essential in order that unions may be able to engage in collective bargaining on even terms.

Arguments of a more palatable nature than necessity also exist. Basically, such activity increases the opportunity for political participation by individuals. 28/ Therefore, a social purpose follows from an acceptance of this position. Again, to the extent that the minority of individual members are not in sympathy with a political position taken by the majority,

it must be remembered that a union is a different entity than its members.

As Mr. Justice Frankfurter puts it: 29/

...[T]he law regards a union as a self-contained, legal personality exercising rights and subject to responsibilities wholly distinct from its individual members.... It is a commonplace of all organizations that a minority of a legally recognized group may at times see an organization's funds used for promotion of ideas opposed by the minority.

It should also be noted that the union's opponent, the company, is allowed to donate corporate funds for political purposes, subject only to general limitations in this area. Historically, a double-standard has applied in this area, unions donations sometimes being considered ultra vires. 30/ If one accepts the legitimacy of business companies' political expenditures where the raison d'être of the entity is private gain, a fortiori a similar acceptance must be granted unions whose political objectives are obvious. 31/

Several major suggestions have been made as to how this problem should be dealt with. In Canada, of course, there is the British Columbia legislation 32/ which prohibits unions from either directly or indirectly chaneling check-off monies to political parties and which also permits companies to refuse to pay such sums to unions unless they so pledge in writing. This legislation, whose constitutionality has been upheld by the Supreme Court of Canada, 33/ would appear to be so completely unacceptable that no discussion of it is necessary.

Another unacceptable method of dealing with this problem is to divide the union dues into two parts, specifying that part which is "not reasonably necessary and related to collective bargaining purposes". 34/ Under this theory, political action is deemed to fall within this latter named category.

It is considered an illegal act to require the collection of these sums and, as such, is enjoined. Because it is the thesis put forward in this paper that political action is necessary to successful functioning of unions, this suggestion should be discarded. On the same basis, one would have to reject the English opt-out principle applied to political expenditures. 35/

Again, one must reject the position of the United States Federal Corrupt Practices Act, which states: 36/

It is unlawful for...any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors or the Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee or other person to accept or receive any contribution prohibited by this section.

This Act quickly was whittled down by judicial activity: union papers were excepted 37/, as were advertising in radio and newspapers 38/, or T.V. programmes. 39/ In result, the Senate Subcommittee on Privileges and Elections concluded that almost any political expenditure was valid under the Act as long as it was not in the form of direct payment to a party. 40/ This result, of course, stems from the difficulty of distinguishing between patriotism and political activity 41/, as well as the natural tendency of unions to further their interests.

Because outright prohibitions have not worked, suggestions have been made that the correct course of action would be to place a limit on the monetary contributions of a union. 42/ Although I have not been able to get figures for Canada as yet, the Senate Subcommittee on Privileges and Elections stated that of the total cost of \$140 million of the 1952 presidential

election only one per cent came from direct union donation. 43/ It also stated that seven families donated \$420,000. Assuming that Canadian figures are comparable, such a restriction seems ridiculous if there is any question of influence through the donation of money involved.

A more difficult problem relates to the power of a union to discipline members for failure to follow certain union rules relating to political activity. Professor Witmer has declared that: 44/

The advancement of economic democracy...may call for action on the political front. Trade union discipline may call at least sometimes, for adherence to the political program. A departure from this program at the polls may be as serious an offense as is crossing the picket line. Shall the courts forbid punishment of the offender?

Such a position seems untenable. It is one thing to require a trade union member to give money to support a political party; it is another to require him to vote for or speak out for that party on pain of loss of union membership. As has been indicated, the money involved is minimal; the alternative is absolute. Fortunately, case law (at least in other countries, Canada having none) supports the right of the member in this situation. 45/ It might appear wise to the Task Force, however, to legislate on this point alone.

In conclusion, it is the writer's view that the attacks on unions' political activities finds no basis in theory or in practice. As pointed out earlier, there seems to be nothing to distinguish political contributions by unions from those of any other corporate entity in our society; indeed, there seems to be more reason for such activity in the case of unions. Again, it seems quite clear that, in fact, the amounts of money contributed by unions are small. Union constitutions as well reflect a

rather limited role for unions in this area (see Table XXIII): only five constitutions mentioned political activity directly, two of which limited the funds to be used, two limited support to that of "the union as a whole", while the fifth prohibited any political support. Such facts do not support the picture of unions bringing their limitless power to bear on their down-trodden members to force support of unpopular political positions.

Studies of the attitudes of members in the United States show that the average member is apathetic towards political action and, correspondingly, the power of the union at the polls is limited. 46/ Such views exist not only at the lowest level but also in the middle ranks of union leaders. Professor Bartlett has concluded that: 47/

Critics have urged the labor movement to be more active in politics. Rank and file leaders show little interest in a larger political role. On almost all issues their attitudes were very little different from members'. Above all they were job conscious, especially of their own jobs or shops.

Neither favored a political act unless it was absolutely necessary to achieve or maintain an economic goal not possible to achieve or maintain through collective bargaining....

It would seem that only at the highest levels of union organization or in the isolated and atypical union is this not the case. Comparable views exist in Canada. Consequently, some consideration should be given to determining whether opponents of political action by unions are merely oblivious of the facts or are motivated by a desire to hamstring and discredit unions.

Fair Representation in Bargaining Issues

Aside from the matters mentioned above, there is one other major area where union decisions may raise difficulties: in the area of normal bargaining activities where such decisions are made in a manner which discriminated

TABLE XXIII

PROVISIONS RELATING TO POLITICAL ACTIVITY IN UNION CONSTITUTIONS

1. The United Automobile Workers (97,000) has a Citizenship fund with a 5¢ contribution per month per member to promote democracy and citizen participation.

The individual member has right to direct his 5¢ to non-partisan citizenship organization named by the International Executive Board.

2. The International Brotherhood of Pulp, Sulphite & Paper Mill Workers (40,000) forbid political and religious participation at meetings but allow the union as a whole to support political action as recommended by the Canadian Labour Congress (C.L.C.).
3. The Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employees (18,000) forbids support of any political party or religious organization by the union as a whole.
4. The Transportation-Communication Employees Union (8,000) provides that the State, Province, or Territory may elect a representative to look after the legislative and political interests of the Union in such territory.
5. The International Longshoreman's & Warehouseman's Union (3,000) has a Political Action Fund to promote political education and legislation in support of the goals of the International. The International has the power to levy \$1.00 per year to build up the fund.

among members of the bargaining unit. In so far as such decisions occur in the administration of union affairs, they will be dealt with in Chapter VII; here we only need to look at decisions as to the terms of collective agreements.

In this latter area the opportunity to discriminate against individuals or groups of members of the union is limitless. For example, racial groups can be effectively left in low-paying job classifications by use of a seniority system fitted for that purpose or women can be denied equal pay for equal work by use of job descriptions that include physical requirements a woman could not do but which are, in fact, not required for the job. Although it is impossible to gather data quickly on the scope of such problems, it is clear to the writer that such abuses frequently occur. Indeed, I have seen pay scales set out in collective agreements that clearly offend equal-pay acts. 48/ Reported cases also indicate a similar cavalier disregard for the law in related areas. 49/ Thus, although there have been statements by unions to the contrary 50/, it seems obvious that there is a problem here which must be dealt with.

To deal with these problems, three methods of attack are open: (i) specific legislation making certain practices illegal; (ii) court action; or (iii) action by labour relation boards. The first of these has been dealt with in part. 51/ Thus, most jurisdictions in Canada have something equivalent to the federal Female Employees Equal Pay Act, Statutes of Canada 1956, c. 38. 52/ As noted above, such legislation has not been wholly successful. This does not mean, of course, that it has had no effect. With this in mind, the Task Force might consider legislation in basic labour acts which sets out the limits of valid provisions in collective agreements. Specifically, the Task Force might wish to consider the way the United States

Civil Rights Act of 1964 reads that "...it shall not be an unlawful employment practice ... [to utilize] bona fide seniority system" provided that consequent differences in employment terms are "not the result of an intention to discriminate because of race, colour, religion, sex or national origin..."^{53/} Such a provision, suitably altered to meet the above suggestions, would at least have the advantage of clarifying the rights of members.

The second method has been brought to the fore recently in the case of Hornak v. Patterson. ^{54/} There the Court stated: ^{55/}

Having regard to the nature of the relationship between a member and his union involving a consideration of the powers granted to and responsibilities imposed upon unions vis-à-vis their members I would be prepared to imply in this membership contract a provision that the union shall not discriminate between members in applying any policy it might adopt with respect to job opportunities or the assignment of men to available employment. I think such a term can be implied confidently applying the principle explained by MacKinnon L.J., in Shirlaw v. Southern Foundries (1926) Ltd., [1939] 2 K.B. 206 at p. 227.

Consequently, it would appear that the courts are, in some cases at least, ready to assist members who are discriminated against. The questions of importance are, however, will they do this in enough cases and is the remedy one appropriate to collective bargaining? The answer to the first question is unascertainable at present, and briefly, the answer to the second is in the negative. An elucidation of these points has already been given. In short, therefore, you cannot depend on court action, although it may be made use of in some cases, and legislation, as mentioned in the previous paragraph, will be of help in this respect.

The final point—action by labour relations boards—seems to be the most important one. Here, of course, the remedy lies in refusal or withdrawal of certification from unions which discriminate against any of its members. At

present in this area the only activity by such boards lies in the refusal to certify on the basis of membership which has already been discussed and the refusal to recognize certification rights that have not been exercised.^{56/} The latter is the only one germane to the point under discussion and does not cover the total problem. Basically, this action, as it relates to our problem, only occurs when one union (usually a craft union) seeks to carve out part of an existing unit. Thus, the discrimination dealt with lies in the area of work standards and, far less frequently, in the area of dual unionism or union loyalty.

What is needed, however, is something akin to the Steele doctrine ^{57/} which establishes the principle that as the corollary of the authority of exclusive representation on the part of collective bargaining representatives there is a duty of fair and equal representation of those it so represents.^{58/} Professor Cox, writing in 1957, described the duty as follows: ^{59/}

The duty of fair representation extends to all phases of collective bargaining. It binds the union in negotiating collective agreements and in handling grievances. It is violated by hostile discrimination or other forms of unfairness in arranging terms and conditions of employment without the formality of a contract or grievance.

Another author described the essentials of the duty briefly when he said that "...a union...must represent all its members fairly. Determinations by the union which are arbitrary, in bad faith, unfair, irrelevant, invidious, political or racial are violations of the duty..." ^{60/} What, in fact, the phrase connotes is that the union, as the bargaining agent, owes to each and every member of the bargaining unit (be he a union member or not), the duty to represent him in a bona fide fashion before management either in negotiating a new contract or processing a grievance. In essence, it owes its existence to a desire to protect minority or individual interests.

Case law in the United States now indicates that while an employee has recourse to either the NLRB 61/ or the courts 62/ in attempting to obtain a remedy for a breach of the duty of fair representation, it is difficult to determine whether such an action constitutes an unfair labour practice. 63/ Irrespective of this latter uncertain area, the issue boils down to another instance of the confrontation of the individual interests of members of the bargaining unit and the principle of union control. In the eyes of many, the subordination of the individual interest to union control in Vaca v. Sipes is intolerable 64/, for the situation now exists that "the employee must rely on his union to represent his interests, and absent specific malfeasance by his union he may not secure an adjudication of any claims he may have against his employer either through internal grievance machinery or in court." 65/

However, the thrust of the points made above is that while the existence of such a "duty" has ameliorated the harsh effects of the collective bargaining process and made it much more responsible and responsive, judicial interpretation has emasculated the doctrine and imposed uncertainty on the law. In Canada, it would seem possible that an adventurous labour relations board might easily develop and apply such a principle, but there is little hope that it will do so absent a direct legislative pronouncement. This, it is suggested, should be done.

In so doing, it should be re-emphasized, however, that the record of the United States Labor Relations Board has not been distinguished in this area, despite the Miranda decision. Thus, it has been stated: 66/

Strangely enough, while threatening to revoke the certification of any union whose internal policies included a refusal to grant equal status to all employees in the bargaining unit for which

it was the exclusive representative, the [N.L.R.] Board has not once, in over 14 years, found the facts of any case sufficiently clear to require such action on its part.

Presumably, the Canadian record might not be much better. It would seem, nevertheless, that the threat of such decisive, speedy, and relatively inexpensive action would be of value to this area of the law.

REFERENCES

- 1/ See, e.g. S.I.U. v. Stern, 29 D.L.R. (2d) 29 (Can. S.C. 1961); aff'ing [1960] Que. Q.B. 901. This point is also made in Hurwitz v. Directors Guild of America, Inc., 364 F. (2d) 67 (1966); where examples are set out.
- 2/ This point is made in Note, 41 N.Y.U.L. Rev. 584, at 595 (1966). Cf. Comment, 114 U. Pa. L. Rev. 700 (1966).
- 3/ See, e.g., Macdonnell, Freedom of Occupational Association and Human Rights, 26 Can. Bar Rev. 683 (1948), where at p. 685 he reproduces the resolution presented by the World Federation of Trade Unions to U.N.E.S.C.O.:

II. Trade Union organizations should be able to administer their own affairs, to deliberate and fully decide on all questions falling within their competence, in conformity with the law and with their constitution without interference in their duties from governmental or administrative bodies.

At p. 686 he reproduces similar I.L.O. provisions which, he says, are designed to preclude legislation with the "purpose of bringing the whole functioning of such organizations [unions] under the permanent control of administrative authorities". [p. 689]
- 4/ Kahn-Freund, Law and Public Opinion in the Twentieth Century (1962), p. 224. See also Graveson, The Status of Trade Unions, 7 J. Pub. Teachers of Law 121 (1963).
- 5/ This point is made in Summers, Internal Relations Between Trade Unions and Their Members, 19 Lab. Rev. 175, at 175 (1965).
- 6/ E.g., S.I.U. v. Stern, supra, ref. 1.
- 7/ This is one of the most crucial points as far as the Donovan Commission Report was concerned. Because the union rule book was the basis for the contract between the union and its members, and for this reason controlled the expulsion procedure, the Report recommended that "trade union rule books should be clear and unambiguous". As a result, Paras. 648-57 were included in order that each member know the exact terms of his contract, and thus the possible reasons for expulsion.
- 8/ It is interesting to compare the Canadian position with that in the United States. See U.S. Dept. of Labor, Disciplinary Powers and Procedures in Union Constitutions (Bull. No. 1350, 1963), from which much of this section is patterned. Specific offences are set out in Comment [1966] Duke L.J. 717, p. 717, fn. 1: "Examples of specific offences for which discipline is imposed include: (1) Work-connected offences: 59 unions prohibit working on a job while a strike is in progress and 31 punish work stoppages in violation of a contractual agreement. ...Other offences vary with the union; for example, the Garment Workers Union imposes fines upon members who drop garment labels on the floor.

... (2) Union loyalty offences: 69 unions discipline members for supporting rival organizations. ...64 unions discipline a member for failing to exhaust internal union remedies before seeking outside assistance. ... (3) Financial offences: 'Any officer found guilty of accepting any bribe or present from any corporation, contractor or association shall be....suspended....or expelled.' ... (4) Personal morals offences: members of Locomotive Firemen and Enginemen Union may be fined or expelled for 'immoral practices, wife abandonment, or improper treatment of family.' ... (5) Political activity offences: 'when such [legislative] policy has been declared, no member of the Brotherhood shall appear before any legislative committee, legislature, State, provincial, or Federal executive, or take any action...in opposition to such a program in any capacity except that of a private citizen: nor shall he, in the name of his Brotherhood, engage in any political campaign for candidate for public office after such candidate has been endorsed by the Brotherhood.' ... (6) Miscellaneous: The Carpenter Union's constitution authorized a fine for members who refused to parade on Labour Day."

- 9/ Note, however, that the Landrum-Griffin Act (LMRDA) did include a provision which placed fiduciary responsibility on the shoulders of officers of labor organizations (s. 501). See Clark, The Fiduciary Duties of Union Officials Under Section 501 of LMRDA, 52 Minn. L. Rev. 437 (1967) for a lengthy discussion of the legislative policy behind this area.
- 10/ See Re McAnnally Freight-Ways, 64 C.L.L.C., para. 16,011 (O.L.R.B.).
- 11/ Here again, fundamental issues are raised around those now familiar and competing attitudes of complete autonomy and controlled effectiveness. The latter rests upon "the often articulated assumption, apparently accepted de fide...that labor organizations should function democratically". [Berchem, Labor Democracy in America, 13 Vill. L. Rev. 1, at 2 (1967)]. Tied to this, of course, are those ideals, attributed to a democracy, of minority freedoms, i.e., speech, assembly. [This thesis has been challenged in Magrath, Democracy in Overalls: The Futile Quest for Union Democracy, 12 Ind. & Lab. Rel. Rev. 503 (1959)]. The Landrum-Griffin Act (1959) reflects the forcefulness of this attitude in the United States. Canada soon will be forced to make that same policy decision and choose between that approach which guarantees a union the right to discipline and control its members based on the need for efficient and effective collective bargaining, balanced against the traditional freedoms to dissent and change your mind. [In particular, reference should be made to Titles I & IV of the above mentioned Act which is contained in the Appendix.]
- 12/ Two United States courts have recently held that union fines imposed under the union constitution creates an enforceable obligation if state law so intimates. More explicitly, these cases concerned strike-breakers. See Local 248, U.A.W. v. Natzke, 153 N.W.(2d) 602 (1967), commented upon in 53 Iowa L. Rev. 1196 (1968); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967), commented upon in several journals. In particular see 46 N.C. L. Rev. 441 (1968), and contrast it with 29 Ohio State L.J. 260 (1968).

- 13/ In the United States this issue is topical. See Hurwitz v. Directors Guild of America, 364 F. (2d) 67 (2nd Cir. 1966). For a more extended comment refer to Loyalty Oaths, 77 Yale L.J. 739 (1968).
- 14/ Note, however, that Congress in the Landrum-Griffin Act expressly alluded to this type of problem. See sections 101 (a)(1), (2), (4) in Appendix J. The Donovan Commission in England also dealt with the problem. (Para. 653).
- 15/ See Summers, Disciplinary Procedures of Unions, 4 Ind. & Lab. Rel. Rev. 15 (1950).
- 16/ See the comments in 29 Ohio S. L.J. 260 (1968); 46 N.C. L. Rev. 441 (1968); 32 Albany L. Rev. 256 (1967); 9 B.C. Ind. & Com. L. Rev. 221 (1967); 19 Syracuse L. Rev. 177 (1967); 36 U. Cinn. L. Rev. 709 (1967); 70 W. Va. L. Rev. 109 (1967); 21 Sw. L.J. 21 (1967). For a more detailed discussion refer to Comment, Labor Law: Union Fining as an Unfair Labor Practice Under Section 8(b) (1) (A), 1966 Duke L.J. 717; Note, Union Disciplinary Power and Section 8(b) (1) (A) of the NLRA: Limitations on the Immunity Doctrine, 41 N.Y. U. L. Rev. 584 (1966); Comment, 8(b) (1) (A) Limitations Upon the Right of a Union to Fine its Members, 115 U. Pa. L. Rev. 47 (1966); Note, Labour Policy: Judicial Enforcement of Fines After Allis-Chalmers, 53 Cornell L. Rev. 1094 (1968); Comment, Judicial Enforcement of Union Disciplinary Fines, 76 Yale L.J. 563 (1967). Also see Owen, Fidelity, Fines and Fair Practice, 18 Lab. L.J. 707 (1967).
- 17/ NLRB v. Allis-Chalmers; Local 248 U.A.W. v. Natzke, 36 Wis. (2d) 237, 153 N.W. (2d), 602 (1967).
- 18/ 53 Iowa L. Rev. 1196, at 1197 ff. (1968).
- 19/ Note the s. 101(a) (5) Landrum-Griffin Act only imposes procedural safeguards on union disciplinary action.
- 20/ Note, Labor Policy: Judicial Enforcement of Fines After Allis-Chalmers, supra, ref. 16, at 1094-95.
- 21/ Could the union's duty of fair representation override the union's normal freedom to discipline internally: supra, ref. 20, at 1097-98.
- 22/ See the conflict of commentators in 29 Ohio S. L.J. 260 (1968) and 46 N.C. L. Rev. 441 (1968). Note also that portion of the argument which dealt with Federal v. State rights has no bearing in Canada in the sense of policy priorities.
- 23/ Note, Union Disciplinary Power and Section 8(b) (1) (A) of the NLRA: Limitations on the Immunity Doctrine, ref. 1, at 189-90.
- 24/ As laid out in a case note in 46 N.C. L. Rev. 441 (1968), at 444-50.
- 25/ See, e.g., Company member Lapham in Re Carnegie - Illinois Steel Corp. and U.S.W.A., 10 Lab. Rel. Rep. 888 (1942), to the effect that if there

is to be union security there should be an undertaking by the union "that it will not during the life of the agreement made, assume, guarantee, repay or participate in any contribution, subscription, pledge or other financial obligation to any political party or candidate for public office."

- 26/ Patrick, Organized Labor's Role in American Politics, 18 Lab. L. J. 274, at 275 (1967).
- 27/ Reynolds, Labor Economics and Labor Relations (1959), at 80-81.
- 28/ See this point made in Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity, 57 Yale L.J. 806, at 826-27 (1948).
- 29/ In I.A.M. v. Street, 367 U.S. 740, at 808 (1961).
- 30/ Osborne v. A.S.R.S., [1911] Ch. 540; app'd in True v. Australian Coal & Shale Employees Fed., 5 West. Aust. L.R. 73 (1959). Note, however, that the former decision was reversed by s. 3(3) Trade Union Act.
- 31/ See this point made in Kallenbach, Taft-Hartley Act and Union Political Contributions and Expenditures, 33 Minn. L. Rev. 1 (1948).
- 32/ The Labour Relations Act, R.S.B.C. 1960, c.205, s.9(6) (c(i),d) (as amended).
- 33/ Oil, Chemical and Atomic Workers International Union, Local No. 16-601 v. Imperial Oil, 30 D.L.R. (2d) 657 (B.C.S.C.) aff'd 33 D.L.R. (2d) 732 (B.C.C.A. 1962); aff'd 41 (1961) D.L.R. (2d) 1 (Can. S.C. 1963).
- 34/ This point is dealt with in Allen v. Southern Ry., 107 S.E. (2d) 125 (N.C. 1962); see also Labor Law - Railways Labor Act - Use of Funds for Non-Bargainable Purposes, 41 N.C. L. Rev. 285 (1963).
- 35/ See the English experience set out in the excellent article, Regulation of Labor's Political Contributions and Expenditures: British and American Experience, 19 U. Chi. L. Rev. 371 (1952). The "opt-in" replaced the "opt-out" principle from 1929-46 in England; though more equitable than the latter, the Donovan Commission recommended the maintenance of the status quo. (Paras. 912-27).
- 36/ 18 U.S.C.S. 610, s.313 (1958). The history of American legislation is set out in Fillenworth, Politics and Labour Unions, 37 Notre Dame Lawyer 172 (1961); and Hanslowe, Labor Law and The Public Interest, 11 J. Pub. Law. 27, at 38 et seq. (1962).
- 37/ U.S. v. C.I.O., 335 U.S. 106 (1948).
- 38/ U.S. v. Painters Local 481, 172 F. (2d) 854 (2d circ. 1949).
- 39/ U.S. v. Anchorage Const. Lab. Council, 193 F. Supp. 504 (D.Alaska, 1961); cf. U.S. v. U.A.W., 352 U.S. 567 (1957); noted in 46 Geo. L.J. 176; and 31 Temp. L. Q. 71.

- 40/ Senate Subcommittee on Privileges and Elections, Interim Report of 1956 Presidential and Senatorial Campaign Studies, 84th Cong., (2d) sess. (1956), at 17-18.
- 41/ This point was made in U.S. v. Const. Union, 101 F. Supp. 869 (W.D. Mo. 1951).
- 42/ E.g., see Note, 46 Geo. L. J. 176 (1957).
- 43/ Supra, ref. 40, at 5.
- 44/ Witmer, Civil Liberties and the Trade Unions, 50 Yale L. J. 621, at 629 (1941).
- 45/ See, e.g. for the United States position: Aaron and Komaroff, Statutory Regulation of Internal Union Affairs, 44 Ill. L. Rev. 425, 631, at 656 (1949). and for the Australian position, Foerander, Trade Union Relations and the "Political Levy" Australia, 10 U.T.L.J. 73 (1953).
- 46/ See, e.g. The United States study in Hudson and Rosen, Union Political Action: The Member Speaks, 7 Ind. & Lab. Rel. Rev. 404 (1954). Common sense indicates the Canadian position is similar.
- 47/ Bartlett, How Rank and File Leaders View Union Political Action, 17 Lab. L. J. 483 at 493 (1966).
- 48/ See Appendix C.
- 49/ E.g., Re T. Barbisen & Sons, O.L.R.B. Mon. Rep., May 60, p. 80; Re McPherson Warehousing Co. O.L.R.B. Mon. Rep., Feb. 65, p. 583; and Re Canada Bread Co., C.C.H. para. 10, 430 (O.L.R.B. 1945).
- 50/ For example, in the United States in November 1962, more than 100 unions signed a no-discrimination pledge which was published in the N.Y. Times, 16 Nov. 62, p. 1, col. 1. See also Hickey, Government Regulations of Union Racial Policies, 7 Bost. Coll. Ind. & Comm. L. Rev. 191 (1966); and Wortmans and Luthans, Incidence of Anti-Discrimination Clauses in Union Contracts, 16 Lab. L. J. 523 (1965).
- 51/ See Chapter III, p. 51 and the legislation compiled in Appendix B and C.
- 52/ See Appendix C.
- 53/ This provision is set out and discussed in Gould, Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964, 13 Howard L.J. 1, esp. at 8 (1967). Cf. the way this problem of discriminatory use of seniority arose in Re Provincial Engineering, O.L.R.B. Mon. Rep., Mar. 67, p. 997.
- 54/ 58 D.L.R. (2d) 175 (P.C.C.A. 1966).
- 55/ Ibid., at 178-79.

- 56/ This is called "sleeping on rights". See, e.g. Re Can. Sandpaper, C.C.H. (55-59), para. 16,111; 2 C.L.S. 76-601 (O.L.R.B. 1958).
- 57/ Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Wallace Corp. v. NLRB, 323 U.S. 248 (1944) fortified this doctrine's position.
- 58/ See Hanslowe, supra, ref. 36, at 36; and Blumrosen, Union Management Agreements which Harm Others, 10 J. Pub. Law 245, at 359 (1961).
- 59/ Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, at 156 (1957).
- 60/ Note, 35 U. Chi. L. Rev. 342, at 345 (1968).
- 61/ Miranda Fuel Co., 140 N.L.R.B. 181 (1962); Local 12, U.R.W. v. N.L.R.B., 368 F. (2d) (5th Cir. 1966). N.L.R.B. v. Miranda Fuel Co., 326 F.(2d) 172 (2nd Cir. 1963) contra.
- 62/ Humphrey v. Moore, 375 U.S. 335 (1964).
- 63/ Supra, ref. 61. In Vaca v. Sipes, 386 U.S. 171 (1967) the majority seems to have assumed that a breach of the duty could become an unfair labour practice; see Lewis, Fair Representation in Grievance Administration: Vaca v. Sipes, 1967 Sup. Ct. 81. Cf. Comment, 8 E.C. Ind. & Com. L. Rev. 881, at 885 (1967). The Vaca case saw the duty of fair representation as "a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of the federal labour law". (at p. 182).
- 64/ Note, 17 Buffalo L. Rev. 165 (1967); Lewis, supra, ref. 63.
- 65/ Note, 77 Yale L.J. 559, at 561 (1968).
- 66/ Aaron and Komaroff, supra, ref. 45, at 440. See also at 445: "After surveying the record of the Board [NLRB] from 1935 to 1947, it is in fact difficult to understand the basis of its reputation as the protector of the rights of racial minorities and dissident groups within union. The most cursory examination reveals behind the facade of lofty sentiments erected by the Board a record of distinctly minor achievement, characterized by numerous temporizations with seemingly basic principles of democracy."

CHAPTER VI

THE INVOLVEMENT OF MEMBERS IN THE DECISION-MAKING PROCESS

In the previous chapter the problem of the type of decisions a union could make was discussed; it seems natural, therefore, to examine next the nature and extent of the individual member's involvement in the decisions a union can make with regard to the bargaining unit of which he is part. 1/ In this regard, three general types of questions emerge: (i) what decisions should be made above the local level; (ii) what decisions at the local level should be made by vote; and (iii) how should voting occur.

Before continuing on to examine these points, however, a few initial observations should be made. First, very little material is available on this area. Second, except for the decision as to a bargaining representative, at present membership in the bargaining unit does not carry with it the right to vote on any matter—only union membership provides such rights, and then merely by virtue of the union constitution.

Finally, I must bring to the attention of the Task Force that this chapter is covered in only the most cursory form. The pressure of time has prevented me from examining this topic in the depth which it deserves. It is hoped, however, that the outline and the points made will be of assistance.

WHAT DECISIONS SHOULD BE MADE ABOVE THE LOCAL LEVEL

Initially, a point by point examination of those issues that face unions should be attempted and a decision made as to the proper level of

union organization at which various types of decision making should occur. This approach would be desirable; unfortunately time precludes such a study. For the purposes of this study we will assume as a minimal standard that decisions affecting conditions of employment should occur at the "local" level. The more complex, borderline matters will have to await further elucidation.

Granted this premise, then, the real issue in this section is the degree to which international or national unions may impose trusteeships on locals, thus depriving the local of control of its affairs as generally envisaged by its constitution. The situation on trusteeships in Canada has been put in these words:

Trusteeship may be defined as any method of supervision or control whereby a parent labour organization suspends the autonomy otherwise available to a subordinate body under its constitution or by-laws. The history of the labour union movement in this country has been marked by a trend away from local independent organizations, each going its own way, to national and international unions exerting a large degree of control over the local unions. The use of the trusteeship device should be understood in the light of this history because the trusteeship is but one of several instruments which parent labour organizations have at their command to control their subordinate bodies. The use of the trusteeship device by labour organizations to discipline a local union or other subordinate body by appointing a trustee (or receiver, supervisor, administrator, or representative) to assume control over its affairs is a grant of power specifically authorized in many union constitutions; however, the public disclosure of information comparable to that reported under Section 9(a) (vii) of the Corporations and Labour Unions Returns Act was not required prior to the enactment of the statute, and, consequently, there is in existence no data on trusteeships prior to 1962. 2/

In short, unions under trusteeship obviously pose problems of a democratic nature as there is a great possibility that the international union will run the local's affairs without concern for the wishes of members of the local. 3/ As noted above there is a definite tendency to rely on this

device. Coupled with this proclivity, there has not been any attempt to limit or regulate its use. Legislation, such as the federal Corporations and Labour Unions Returns Act 4/ or provincial legislation 5/, merely requires the filing of reports or limits, quite loosely, the duration of the trusteeship. Such legislation in no way precludes the inherent evils of this device.

Few persons or bodies have questioned the power of international unions to meddle in their local's affairs. Indeed, many of the principles applicable in topics covered previously in this paper, are applicable here. Basically, the parent union and their subordinate local have their relationship determined by the law of contract. 6/ This, of course, is true only where the relationship is one of "parent-child", whereas similar principles are not applicable if affiliate status is attained by an independent body. The contractual terms are found in the union constitution, either local or international, and it is upon these that the issues relevant here turn. Problems of severance and/or take-overs by the international most concern us.

Severance is bound up in the antiquated "breath of life" 7/ doctrine no longer acceptable in court. If the subordinate body was created by the parent, cesser of the relations causes reversion of the local's interests to the parent. 8/ A status of affiliation, however, allows the affiliate to retain its original independent existence.

More important than the situation which results in an extinguishment of the relationship is the actual power held by the parent over the local. In spite of the rationale for imposing trusteeships 9/, it seems that parent unions can arbitrarily step in. This is unquestioned where it is within the

union constitutional provisions and is challenged only if illegal 10/ or if certain forms of due process are not observed. 11/ Thus, it would seem that a local could only protect itself if it so desired by including a provision in its local constitution to that effect. However, it is unlikely that the international would permit it.

The mere existence of the "breath of life" doctrine which "propounds that a parent organization breathes life into the local, and, should the cord from which the local derives its being be severed, the life goes out of the local" 12/, when taken in relation to the parent's power to remove officers from the local, forces the local's constitution to conform, and generally controls its activities, creates an onerous situation fraught with unwholesome possibilities. 13/ Quite obviously, legislation along Ontario's line is only a preliminary step.

These difficulties have been dealt with by labour relations boards in determining whether a union is "qualified". Obviously, as earlier chapters have indicated, to be "qualified" a union must exist to promote the interests of its members. When a union is in trusteeship there is some doubt if this is being accomplished. The Alberta Board has recognized this in the Trucking case:

In cases where the affairs of a local union are being corrupted by the elected officers the Board can readily see that placing the local union under trusteeship or receivership would be very desirable for the protection of the affairs of the local union to the benefit of its membership, but in cases where the trustee and his agent is appointed by the International do not carry out the wishes of the employees in the field of collective bargaining. such conduct impairs the bargaining rights granted under a certification. 14/

In Ontario, no such distinction seems to have been made and so any trusteeship can be a "qualified" union. 15/ However, whether a union is qualified or not is a question of fact and so even the Ontario Board could make the obviously valid distinction of the Trucking case. It might be wise for the Task Force to put such a position clearly into legislation; such a move would not alter boards' powers, but it would make them more likely to avail themselves of it.

In examining this point, the Task Force might have regard to Tables XXIV and XXV. The first of these shows the number of unions and union members affected by trusteeship in 1964 and the second shows the reasons for the imposition of trusteeships during the same period. A glance at the Tables shows that although the percentage of union members affected by trusteeships is small, the number in itself is not inconsequential. The reasons given also give rise to some misgivings. Often they are extremely vague or, when clear, imply attempts by the international to prevent locals from following policies favoured by its members.

Naturally, whether one regards this with a jaundiced eye or not depends on the attitude a person adopts concerning the nature of unionism. In this particular instance we have another confrontation between the principle of autonomy or non-intervention which, allied to the rationale for trusteeships, threatens individual's rights to control their future. Some may consider it sufficient that the courts protect the right of the local, as certified bargaining agent, to agree to the terms of a collective agreement. Others may consider further intervention necessary, be it judicial or legislative. Therefore, what the Task Force does on this topic will depend on the determination of this question for it may be that the latter group is over-reacting. It is suggested, however, that even if one eschews the concept

TABLE XXIV

NUMBER OF ACTIVE TRUSTEESHIPS IMPOSED BY UNIONS REPORTING IN 1965 UNDER THE
CORPORATIONS AND LABOUR UNIONS RETURNS ACT, STATS. CAN. 1962, c. 26 17/

Type of labour organizations imposing trusteeship	Number	Congress affiliation		Trusteeships	
		AFL-CIO/ CLC	Unaffiliated	CLC Number	Membership affected
International unions	10	9	-	1 17	6,056
National unions	2	-	1	1 3	2,477
TOTAL	12	9	1	2 20	8,533

TABLE XXV

REASONS FOR IMPOSITIONS OF TRUSTEESHIPS REPORTED BY LABOUR

ORGANIZATIONS REPORTING IN 1965 UNDER THE CORPORATIONS AND

LABOUR UNIONS RETURNS ACT, STATS. CAN. 1962, c.26 18/

Parent labour organization imposing trusteeship	Subordinate unions in trusteeship		Reasons reported for imposing or continuing trusteeships
	Number Reported	Membership affected	
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (AFL-CIO/CLC)	1	873	Failure of local union's officers to comply with International Constitution.
United Brotherhood of Carpenters and Joiners of America (AFL-CIO/CLC)	18	5,677	To restore harmony and unity among members officers, representatives and subordinate bodies in the area in the interests of those directly affected and of the Brotherhood as a whole.
International Chemical Workers' Union (AFL-CIO/CLC)	1	5	To assure orderly processes and to fully protect the interests of the membership during an attempted raid by a competing union.

TABLE XXV (Cont'd)

International Hod Carriers, Building and Common Labourers' Union of America (AFL-CIO/CLC)	1	753	To protect and preserve the welfare and interest of the local union as an insti- tution, and in order to eliminate violence and disruption of meetings and affairs.
Hotel and Restaurant Employees and Bartenders International Union (AFL-CIO/CLC)	1	949	For the purpose of re-running elections for local union officers.
Laundry, Dry Cleaning & Dye House Workers' International Union (CLC)	1	130	Because of the failure of the local's officers to properly manage the union's affairs and conduct legitimate collective bargaining.
International Association of Machinists (AFL-CIO/CLC)	1	238	Disruptive factionalism within the local lodge.
Brotherhood of Painters, Decorators and Paper-hangers of America (AFL-CIO/CLC)	3 (1)	798 (71)	Affairs improperly conducted. Failure to hold regular meetings, elect officers or collect dues.
	(1)	(716)	Mismanagement. Failure to submit required financial reports and per capita tax, or to comply with directives of general officers.
	(1)	(11)	Failure to carry out policies of the Brotherhood or administrative procedures promulgated by it. Fostering secession.
International Printing Press- men and Assistants' Union of North America (AFL-CIO/CLC)	1	82	To correct possible financial irregular- ities.

TABLE XXV (Cont'd)

United Steelworkers of America (AFL-CIO/CLC)	2 (1)	94 (1)	Permanent closing of plant affecting all members of the local union.
	(1)	(93)	Suspected financial malpractice.
Upholsterers' International Union of North America (AFL-CIO/CLC)	1	12	To protect the assets of the local union pending permanent dissolution of the employer's operations.
Canadian Brotherhood of Railway, Transport and General Workers (CLC)	2	2,422	To assist the local union officers in properly administering the affairs of the union in the face of organizational activities being conducted among the membership by a rival labour organization.
Federation of Telephone Workers of British Columbia (Traffic) (Ind.)	1	55	The sudden loss of leadership caused by the resignation of local officers make national union assistance necessary.
TOTAL	34	12,088	

of a federation of locals to enable unions to present a monolithic bargaining front, at least some limitations will have to be placed on trusteeships, both in their duration and in the basis for their imposition. 16/

WHAT DECISIONS ARE MADE
BY VOTE AT THE LOCAL LEVEL

An examination of provisions in union constitutions relating to voting is extremely interesting. First, the subjects covered are extremely wide: financial matters, alterations of union form and bargaining issues generally are made the subject of votes. (See Tables XXVI to XXIX). Second, on important issues there is a surprisingly large number of unions which have subscribed to voting on these points. Thus, almost half the workers examined could vote on the commencement of strikes (Table XXVII), and almost as many on ratification of collective agreements (Table XXVIII).

Of the matters covered, most need not bother the Task Force, being matters not touching on rights that could be classed as democratic by any stretch of the imagination. Others, however, can be singled out for special consideration.

Assessments and dues: Figures indicate that of the 50 unions studied, 17 (with a total membership of about 302,000) provided for a vote on assessments and only 7 (with a total membership of 77,000), for votes on increases in dues. (See Table XXVI). Although this may be higher than one expects, it still is hardly adequate where not only can dues be used to exclude members but also can be forced on non-members in the bargaining unit. 19/ It would seem that as a bare minimum all matters of financial obligations to a union should be subject to a vote by its members.

TABLE XXVI
CONSTITUTIONAL PROVISIONS OF VOTING

	Subject of vote	Type of vote	No. of unions	No. of members (To nearest 1,000)
1.	Special Conventions	S NP	5 7	145 126
2.	Assessments	S NP	13 4	222 80
3.	Charge Against Member	S NP	2 2	140 56
4.	Recall of Officers	S NP	4 3	70 42
5.	Wage Increase of Officers	S NP	2	32
6.	International Executive	S NP	11	238
7.	Mergers, Withdrawals, & Dissaffiliation	O S	1 2	52 40
8.	Welfare of General Membership	O S NP	1 2 2	52 52 (1) 3
9.	Dues Increase	S NP	6 1	66 (2) 11
10.	Amendment of By-Laws or Trade Rules	S NP	4 2	21 (3) 17

LEGEND: O - Open
S - Secret
NP - Not Provided

- (1) In one instance involving 18,000 members a majority of two-thirds is required provided that one-third of all eligible voters vote.
- (2) In one instance involving 11,000 a two-thirds majority is required.
- (3) In two cases involving 13,000 members a two-thirds majority is required.

Strike Votes: As noted earlier, a rather high number of constitutions provided for strike votes. (See Table XXVII.) Here, however, certain deficiencies exist besides a lack of complete coverage: e.g., length of membership requirements and executive interference.

As this problem has been dealt with in depth by Professor Anton 20/, his arguments and findings need not be repeated here. It should be pointed out, however, that it is the writer's view that all strikes should only be called pursuant to a secret strike vote. Again, although this might be politically impossible, it would seem that all members of the bargaining unit should participate in this vote. Clearly, under present circumstances these persons are affected by the decision to strike as immediately as union members and, granted my earlier suggestion that they pay a bargaining fee, it does not seem impractical or unjust to have them vote on this matter.

Ratification of a Collective Agreement: In this area, where voting provisions are less prevalent than in strike votes (see Table XXVIII), similar arguments for required voting by the membership (if not the bargaining unit) prevail. As in the case of strike votes, executive decisions which cannot command the agreement of the membership will likely promote unrest in any event and so a vote, if anything, will be of value in this respect alone.

Amendments to the Constitution: As will be seen by Table XXIX, most constitutions do not provide for constitutional amendments by voting at the local level. As long as the above matters continue to be decided at this level, however, there seems to be little reason to change the rules in this area.

TABLE XXVII

CONSTITUTIONAL PROVISIONS ON STRIKE VOTES

No. of unions	Nature of vote	Maj.	2/3	65%	70%	3/4	TOTAL	No Provision	Number Considered
	S	9	16*	1	1	2	32	18	50
	NP	3							
<hr/>									
No. of members (To nearest 1000)	S	81	275	1	23	56	444	498	942
	NP	8							

1. Two unions, involving 66,000 members require a minimum of 6 months membership to qualify to vote on a strike.
2. In one instance, the Brotherhood of Railroad Trainmen (20,000) a strike vote is not necessary but if taken, a two-thirds majority is required.
3. No strikes are permitted by the Int. Assoc. of Firefighters (13,000).
- 4.* In one instance, involving 15,000 members, 25 per cent of the eligible voters must be present.
5. In a separate instance also involving 15,000 members no vote is necessary if a general strike is called.
6. In one instance involving 40,000 members, once a strike is approved the approval of the President and Secretary is required to end strike, while in four cases involving 130,000 members a majority approval by secret ballot is required to end the strike.

TABLE XXVIII

CONSTITUTIONAL PROVISIONS ON VOTING FOR RATIFICATION OF COLLECTIVE AGREEMENTS

	Nature of Vote*	Nature of Majority			Sub Total	Total Number With Provisions	Number With No Provisions For Voting on Collective Agreements	Number Considered
		Simple	2/3					
No. of Unions	S	3	2	5				
	O	1	-	1	16		34	50
	NP	10	-	10				
No. of Members (To nearest 1000)	S	45	59	144				
	O	52	--	52	354		588	942
	NP	158	--	158				

* LEGEND - S - Secret
O - Open
NP - Not Provided

1. In one instance involving 3,000 members, a vote with a simple majority is held, if the International Convention feels ratification is desirable.
2. In one case involving 52,000 members there is provision for an open vote to decide to terminate a collective agreement.

HOW VOTING SHOULD OCCUR

In this area three general problems emerge: (1) what information should a unionist have before he votes?; (ii) how should meetings at which voting takes place be conducted?; and (iii) should votes be secret or open?

A brief glance at Table XXIX indicates that there is almost no protection in union constitutions for members' access to information. Thus, 8 unions with 227,000 members provide for access to financial statements, while 42 unions with 715,000 members do not; 2 unions with 26,000 members provide for access to by-laws, while 48 unions with 916,000 members do not; and finally, 2 unions with 23,000 members provide for access to collective agreements, while 48 unions with 919,000 members do not. It can be assumed that practice improves this situation, but even then it seems hardly adequate.

Consequently, it would seem only right to enact legislation similar to that of Ontario, which would make available to any union member their union's constitution and by-laws, and to any member of the bargaining unit the collective agreement affecting them. 21/ As well, members of the union at least should be entitled to financial reports 22/ and, if a bargaining fee is accepted, all persons who are required to pay this fee should have similar rights. 23/

No studies of how union meetings are conducted in Canada have come to my attention, but it seems reasonable to assume that not all are models of parliamentary democracy. Consequently, it might be considered whether legislation should require that union meetings meet certain statutory standards, such as was done in the Landrum-Griffin Act. 24/ If this proves to be the

TABLE XXIX

CONSTITUTIONAL PROVISIONS ON VOTING FOR AMENDMENTS TO CONSTITUTION

	Nature * of the Vote	Majority Required		2/3	Sub Total		Total	No Provision For Voting by Members on Amendments to Constitutions	Total Considered
		Simple				Total			
No. of Unions	S	12		4	16		21	29	50
	NP	5			5				
No. of Members (To nearest 1000)	S	121		43	214		256	686	942
	NP	42			42				

* LEGEND - S - Secret
NP - Not Provided

1. In one instance, involving 3,000 members, a majority from 10 locals in a minimum of 5 States or Provinces is required.

case, the Task Force should look at the brief but excellent article by Professor Givens. 25/

Before proceeding on to determine whether matters should be decided by secret ballot or not, some mention should be made of elections in general. This particular topic was considered of sufficient merit by the Donovan Commission to fill nearly four pages of their report. 26/ Their major concern was the low level of membership participation. They felt, and rightly, that "...a very low level of participation runs the risk of placing power in the hands of unrepresentative minorities and weakening the authority of elected officers." 27/ The other concern was election malpractice. 28/ As regards the former, the Commission suggested the use of either a postal vote or having the election in the working-place. The problems inherent in the latter could be overcome, it was felt, by having the rules defined in reasonable detail, e.g., nominations, qualifications, since it was these rules that embodied the contract between union and members. This particular aspect was dealt with above.

In conjunction with the above is the question which concerns the use of the secret ballot. This seems to be a matter which is easily decided. Specifically, my suggestion is that where legislation requires a vote, such vote should be secret; in other circumstances the individual unions should be able to decide on this matter as they wish. In short, I suggest that strike votes and contract ratification be by secret ballot. 29/

TABLE XXX

ACCESS OF MEMBERS TO UNION INFORMATION

<u>Type of Information</u>	<u>No. of Unions</u>	<u>No. of Members</u> (To nearest 1000)
Provision for access		
Financial Statements	8	227
(Frequency of Statements - monthly	(4)	(125)
- yearly	(3)	(91)
- not specified	(1)	(11)
No provision for financial statements	42	715
Provision for access to by-laws	2	26
No provision for access to by-laws	48	916
Provision for access to collective agreements	2	23
No provision for access to collective agree- ments	48	919

Note: In one instance, involving 5,000 members, there is a provision for a financial report whenever there is a change of officers of the Union.

REFERENCES

- 1/ Professor Archibald Cox of Harvard has described the union decision-making process: "When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation of striking a balance. The process is political. It involves a mélange of power, numerical strength, mutual aid, reason, prejudice, and emotion." Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, at 626-27 (1956).
- 2/ Minister of Trade and Commerce, Annual Report Under the Corporations and Labour Unions Returns Act (Can. 1965, Pt. II - Labour Unions), p. 64.
- 3/ See Re B.C. District Telegraph Co. Ltd. and Int'l Brotherhood of Electrical Workers, Local 213 et al., 66 CLLC, P.14,107 (S.C.B.C.) where the representatives of an international union executed a collective agreement on behalf of a local which had refused to sign the same, the latter was within its rights to repudiate the agreement. Only the local as certified bargaining agent had the authority to agree to the terms of an agreement binding on the employees.
- 4/ Stats. Can. 1962, c.26.
- 5/ E.g., The Labour Relations Act of Ontario, R.S.O. 1960, c.202. s.60.
- 6/ Carrothers, Collective Bargaining Law in Canada (1965), p. 515.
- 7/ Lakeman & Barret v. Bruce, 1950 3 D.L.R. 146, [1949] 1 W.W.R. 886.
- 8/ Raymond v. Doherty (1962), 34 D.L.R. (2d) 610; aff'd (1965) 49 D.L.R. (2d); 65 CLLC P. 14,079; Lakeman & Barret, ibid.
- 9/ "The inherent authority of a labour organization to invoke such action over its subordinate bodies has long been recognized and accepted as an effective means of maintaining the security and integrity of the union. Local unions are chartered by the parent labour organizations and the principle is well established that the parent organization should have the power to discipline, or even to expel from membership recalcitrant subordinate bodies. It is implicit that subordinate labour organizations should operate and function in conformity with the governing laws and philosophy of parent organizations, and that locals and branches should adopt by-laws consistent with the objectives, principles, and procedures of the parent organization". Supra, ref. 6, at 69.
- 10/ Anderson v. Amalgamated Clothing Workers of America (Manitoba Queen's Bench, 1966), 67 CLLC P. 14,015.
- 11/ The parent must give the local a fair hearing and observe the rules of natural justice: e.g., Local 1571, I.L.A., [1951] 26 M.P.R. 129.

- 12/ Supra, ref. 6, at 516.
- 13/ Consider the possibility of United States control of unions at the local level without regard to Canadian conditions, etc. Also note the possibility that members of the bargaining unit, who may be able to affect local policy, although not union members, will be submerged under a trusteeship, and subjected to international policy.
- 14/ Re W. & H. Trucking, CCH (55-59), P. 16,143 (Alta. 1959).
- 15/ See Re R. S. McCord, 4 D.L.R. (2d) 455 (Ont. H.C. 1956).
- 16/ Note the provisions of Title III, Landrum-Griffin Act. Section 301 (a) is similar to s.9 (a) (vii) of the Corporations and Labour Unions Returns Act; however, s.302 limits the purposes for which a trusteeship may be established; s.303 indicates certain unlawful acts, and s.304 provides for enforcement provisions. For the specific provisions see Appendix "J".
- 17/ Taken from Annual Report, supra, ref. 2, at 64.
- 18/ Taken from ibid., at 65-66.
- 19/ See s.101 (a) (3) Landrum-Griffin Act which prescribes special election procedures applicable to local union and organizations other than locals for increases in fees and assessments. The Supreme Court of the United States had adopted a liberal attitude regarding union monetary exactions, [Musicians v. Wittstein, 379 U.S. 171 (1964)] which may be unwarranted when considered in relation to s.101 (a) (5) which allowed disciplinary action for non-payment of dues.
- 20/ Anton, Government Supervised Strike Votes (1963).
- 21/ See s.104 Landrum-Griffin Act which imposed this duty.
- 22/ The Labour Relations Act of Ontario, R.S.O. 1960, c.202, s.63. See this legislation applied in Re Local 93, United Brotherhood of Carpenters & Joiners, Ottawa, OLRB Mon. Rep., Apr. 66, p. 54.
- 23/ For a list of material on such information, see Sexton and Heneman, Selected Bibliography on Union Accounting and Financial Reports, 2 Ind. & Lab. Rel. Rev. 116 (1948).
- 24/ Title IV, ss.401-404.
- 25/ Givens, The Landrum-Griffin Act and Rules of Procedure for Union Meetings, 12 Lab. L.J. 477 (1961).
- 26/ Pp. 171-74; Paras. 632-47, 653.
- 27/ Ibid., Para. 633.
- 28/ Ibid., Paras. 637-47.

- 29/ On the problems of framing legislation on secret ballots, see Beard, Union Officer Election Provisions of the Labour-Management Reporting and Disclosure Act of 1959, 51 Va. L. Rev. 1306 (1965).

CHAPTER VII

THE INVOLVEMENT OF MEMBERS IN THE ADMINISTRATION OF UNION AFFAIRS

In this chapter only two matters will be dealt with: (i) the method by which union officers are selected and the control members have over these men; and (ii) the rights individual members of the bargaining unit have in relation to the arbitration process. Naturally, other topics could be covered here, but some (such as problems of fair and non-discriminatory representation) have been dealt with already, while others (such as members' rights to put forward their views to the union executive in an effective manner) require information not available for purposes of this study. With the matters studied, however, the Task Force, it is hoped, will have the basic material before it in this area.

SELECTION AND CONTROL OF UNION OFFICERS

The importance of this topic obviously relates to the degree to which decisions are vested in the hands of union officials and the extent to which such officials are accessible and responsive to rank-and-file members. 1/ The first of these considerations has already been dealt with and it seems clear that a vast number of union decisions are made by the union executive; the second can only be the subject of speculation as no material of importance is available, but it would be fair to assume that such accessibility and responsiveness as exists largely springs from "political" considerations. 2/

In any event, there can be little doubt that the issue of union leadership poses great problems in the field of labour relations because of the

extent of the power it exercises. Unfortunately, the only material I have been able to gather relates only to those constitutional provisions regarding union officers. This is far less than adequate in this area. From personal observations as an arbitrator, I have noticed great differences in the quality of union leadership, especially at and above the level of international representatives. Some unions have uniformly capable men; others exhibit a broad range of talent; while others seem totally lacking in men of ability. Absence of good men at this level seems to bear a direct relation to the extent to which relations with employers exist at a workable level: poor men administer poorly; poor administration results in employee unrest; employee unrests tempts employers to be less than candid with the union; lack of candour on the part of the employer drives union officials to drastic action; and so on. Consequently, a rather broad examination of this problem is required. A more talented group of union officials than that which now exists would assist the functioning of any collective bargaining system; such a study might facilitate the achievement of this end.

I now turn to an examination of union provisions relating to union officers.

Qualification for Office: The Law in this area is that union offices only exist by virtue of union constitutions and, unless an explicit provision exists to the contrary, all members are eligible for office. ^{3/} Thus, where no eligibility clause is present, any member can serve as officer. As can be seen from Table XXXI, the one general requirement is that a member be in good standing with the union for a certain period of time before he can serve as an officer. Most constitutions limit this period of time to no more than one year in the case of local officers, with a slightly longer

TABLE XXXI

MEMBERS ELIGIBLE TO RUN FOR OFFICE IN UNION

CONSTITUTIONS: GOOD STANDING REQUIREMENTS

Period of Good Standing	Local Officers		International Officers	
	No. of Unions	No. of (1) Members	No. of Unions	No. of (1) Members
Constitutions requiring good standing	31	748	35	811
2 months	1	120	-	-
12 months	3	114	4	129
1 year	8	200	4	158
24 months	1	52	1	52
2 years	4	75	3	32
3 years	5	65	7	88
5 years	-	-	7	253
Good standing provisions, but no time period specified	9	122	9*	99
No provision requiring good standing	19	194	15	131

* One union requires candidate for international office to have been a member for 2 years.

(1) In thousands

period for international officers. Nothing seems to be so wrong with this situation that legislation is required to change it. 4/

Table XXXII shows other types of eligibility requirements for union office. One type of limitation is that of political affiliation with the communist party or something akin to it. Although some libertarian arguments might be made against this position, again it seems hardly necessary to legislate on it. A similar argument applies to requirements as to intention to be a Canadian citizen or obtain Canadian citizenship, especially when this is not prevalent at the local level.

A second type of eligibility requirement relates to age. None of these limit persons below 65 years of age and they occur fairly infrequently. Again, no action seems required.

A third category relates to length of union service. Here rather limited requirements exist as to length of service within the jurisdiction of the union or to membership in the union. Others require that officers come up through the ranks or have served as an officer at the local level before serving as an international officer. Again, such provisions seem to be rare and inoffensive.

A further grouping of requirements relates to illegal or unethical conduct. Thus, some preclude persons who are convicted felons or who have been convicted of a crime of moral turpitude. Others prevent members of illegal organizations from being union officers. Although some of these restrictions might raise questions as to membership per se 5/, they seem valid vis-à-vis union office.

TABLE XXXII

SELECTED ELIGIBILITY REQUIREMENTS FOR CANDIDATES

FOR OFFICE IN UNION CONSTITUTIONS

	Local Office		International Office	
	No. of Unions	No. of Members	No. of Unions	No. of Members
Not a Communist or member of similar organization opposed to and advocating the overthrow of democracy	7	175	7	175
Must be a Canadian citizen or intend to become one	2	24	4	160
Under 65 years of age	3*	49	5*	176
Under 70 years of age	-	-	1	16
Worked within jurisdiction of union for:				
6 mos.	1	11	-	-
1 year	2**	26	1**	8
3 years	-	-	2	121
4 years	-	-	1	18
Racketeering within plant or union	3***	119	3***	119
Not a member of illegal organization	2	108	2	108
Supporting a competitive union	2	105	2	105
Not a convicted felon	1	16	1	16
Not convicted of a crime involving moral turpitude	1	11	1	11
Must have come up through the rank and file	1	6	1	6
Must have been an officer, organizer, or business agent of local or international union	-	-	1	52
Member of union for:				
1 year	2	61	-	-
2 years	-	-	1	8
4 years	-	-	1	18
5 years	1	5	-	-
10 years	-	-	1	5
Constitutions with good standing provisions as the only eligibility provision	11	211	9	237
Constitutions with no eligibility provisions	7	39	7	39

* Unless approval of governing body obtained - one union with 8,000 members (included)

** One year within the past five - one union with 8,000 members (included)

***Preying on the labour movement - one union with 11,000 members (included)

Finally, a group of restrictions centre on labour offenses: racketeering within a plant or union or supporting a rival union. Again, such prohibitions are inoffensive and, indeed, are necessary for the functioning of a union.

Method of Election: 6/ As can be seen from Table XXXIII, over half the constitutions studied provide for secret balloting in elections of union officials at the local level. At the international level, the number is somewhat lower, with 14 constitutions covering 343,000 members providing for open or roll call voting. At the local level, however, 18 constitutions with some 350,000 members have no provision on this; at the international level the figure is somewhat less: 8 unions comprised of 208,000 members. It can be assumed that in this latter category open voting prevails.

It is suggested that this is an area where action should be taken. At the local level secret balloting for officers should be the rule for it is here that real oppression and stifling of dissent can occur. 7/ Because voting above the local level occurs with different participants this type of protection is not required.

Terms of Office: Table XXXIV shows the terms of office provided by union constitutions. No action need be taken in this area, but it is worth noting that the terms specified are generally short, especially at the local level. Consequently, entrenchment of officers by this means is highly unlikely.

Dismissal of Officers: Dismissal of officers under the constitution is a matter that is dealt with rarely. Table XXXV shows that only 9 constitutions covering 107,000 members provided for the recall of both local

TABLE XXXIII

METHOD OF ELECTION OF OFFICERS IN UNION CONSTITUTIONS

Method	Local Officers		International Officers	
	Unions	Members(1)	Unions	Members(1)
Secret	32	592	28	391
Open	-	-	5	141
Roll Call	-	-	9	202
No Provision	18	350	8	208

(1) In thousands

TABLE XXXIV

TERM OF OFFICE IN UNION CONSTITUTIONS

Term	Local Officers		International Officers	
	No. of Unions	No. of Members(1)	No. of Unions	No. of Members(1)
1 year	7	113	4	40
2 years	10	183	16	289
3 years	8	226	7	126
4 years	-	-	16	374
5 years	-	-	4	94
1/2 - 2 years	1	15	-	-
1 - 2 years	6	142	-	-
1 - 4 years	1	16	-	-
2 - 3 years	-	-	1	15
3 - 4 years	1	11	-	-
2 - 4 years	1	42	-	-
3 - 5 years	1	52	-	-
32 - 38 months	-	-	1	3
No provision	8	55	1	2

(1) In thousands.

TABLE XXXV

PROVISIONS FOR RECALL OF OFFICERS IN UNION CONSTITUTIONS

	Unions	Members (1)
Number of unions studied	50	942
Constitutions providing for the recall of both local and international union officers	9	107
Constitutions providing for the recall of international union officers only	19	298

(1) In thousands

and international officers; while 19 unions comprised of 298,000 members provided for the recall of international officers only. I have no comments to make on this matter, although it would seem reasonable to provide for recall of all officers under appropriate circumstances. 8/ It should be pointed out that dismissals of union officials, as opposed to loss of membership per se, is not covered by the rules of natural justice. 9/

Obligations of Officers: In no constitutions examined was there any mention of the standards expected of union officers. It can be expected, however, that the common law would impose the standards of fiduciaries on them. The Task Force might consider the wisdom of imposing on union officers by legislation "the highest standards of responsibility in administering the affairs of unions" as has been done by section 501 of The Labor-Management Reporting and Disclosure Act of 1959 in the United States. 10/ Again, such a provision at least clarifies this position. It might be pointed out that corporate directors have been subjected to similar legislative provisions. 11/

INDIVIDUAL RIGHTS IN THE GRIEVANCE PROCEDURE 12/

All labour legislation in Canada visualizes the settlement by arbitration of disputes arising out of the interpretation of collective agreements. Further, the nature of the wording used would indicate that this is to be the only way such disputes should be settled. 13/ Until recent years this view was reinforced by practice.

The rationale for such a position lies not so much in the theoretical position that collective agreements are contracts between two parties, the union and the company, but rather in the theory that the provisions in a

collective agreement constitute "group rights" and, hence, should be enforced by the group as distinct from its components. It follows from this that the group should be allowed to settle, compromise or abandon grievances as it sees fit. This does occasionally permit individual's interests to be sacrificed to those of the majority, but it is felt that this eventually leads to the greatest good for all. This view has sometimes found elucidation in union constitutions (see Table XXXVI) which preclude individuals' rights to process grievances and sometimes only permit grievances to be brought with the agreement of the membership.

Naturally, there is a certain feeling that this situation is too unfair to the individual: even granting good faith on the part of the union, it is difficult sometimes to see why an individual should have to bear the loss of valid individual rights to promote the interests of the group. The courts, consequently, have been moving into this area in an attempt to assist the individual. 14/

Labour Arbitration and Natural Justice: The prime area where courts have been giving protection to individuals is by protecting procedural rights during arbitration. Because the courts regard arbitration boards as being subject to the writ of certiorari 15/, the procedures of these boards must conform to the dictates of natural justice as discussed earlier in relation to dismissals from union membership. Initially, such protection was for the traditional parties. 16/ Now, however, courts have begun to state that where interests of individuals are clearly involved in an arbitration, they must be given notice and treated as a party to that arbitration. 17/

TABLE XXXVI

RIGHTS DURING ARBITRATION

1. In the Brotherhood of Railroad Trainmen (20,000) members in Lodge who hold seniority rights in class of service invalued vote as to whether a member's grievance should be sustained.

If it is not, the member may appeal to the President of the Board.
2. In the Canadian Brotherhood of Railway Transport and General Workers (34,000) once a grievance has been submitted it cannot be withdrawn, nor can the individual attempt to adjust the grievance with the employer.
3. In the Brotherhood of Railway & Steamship Clerks, Freight Handlers & Express & Station Employees (18,000) a member attempting to process his own grievance is liable to expulsion. There is an appeal procedure available where an officer refuses to process a grievance.
4. Under the Code of Ethical Practices of the International Union of Electrical, Radio and Machine Workers (11,000) no member will be denied benefits of grievance procedure because of race, religion, color, sex, national origin or political opinion.
5. In the Transportation-Communication Employees Union (8,000) if union refuses to process a grievance they are obliged to inform the member of his individual rights, if any, or at member request file the grievance with the employer so as to allow member to file to appeal within the union.
6. In the American Newspaper Guild (3,000) the settlement of a grievance can be appealed to local members but the individual has no right to negotiate settlement directly with employer.
7. The Brotherhood of Railroad Signalmen (1,000) have a Grievance Committee which processes a grievance if it feels action is warranted.
8. Canadian Airlines Flight Attendant's Association (1,000):
 - 1) Cannot withdraw grievance
 - 2) Cannot personally try to settle directly without permission of Local or General Chairman
 - 3) Rights of appeal to:
 - (i) General Chairman
 - (ii) Secretary of Association
 - (iii) Convention

This approach raises several practical problems regarding definition of individual interests, the onus of giving notice and so on 18/, but these will be worked out by the courts and boards of arbitration fairly quickly. There are more fundamental difficulties with this approach, however, if one is attempting to protect individual interests. Specifically, there is the problem that such protection only covers arbitrations that are brought: if a union compromises the case before the hearing, natural justice will never come into play. Consequently, although there would seem to be no need for legislation here, if one wishes to protect individuals one will have to go elsewhere.

Individual Actions on the Contract of Employment: In a recent case, Re Grottoli 19/, the highly respected McRuer, C.J.H.C., permitted an employee to by-pass the arbitration provisions of a collective agreement and take his grievance directly to the courts. The significance of this holding is shown by the fact that it was made in the face of legislation which states that: "Every collective agreement shall provide for the final and binding settlement by arbitration...of all differences between the parties [employer and union] arising from the interpretation, application, administration or alleged violation of the [collective] agreement..." 20/ Although there was no mention in the case of any refusal on the part of the union to process this grievance, McRuer, C.J.H.C., gave as the gravamen of his decision the reason that for the Court to refuse jurisdiction: "would put in the hands of a union that has been certified as collective bargaining agent extraordinary power over non-members of the union who were employees of the same employer. The union could see fit to assert the claims of the members of the union but not assert the claims of non-members of the union." 21/ He continued that in view of the foregoing the legislation

could not be interpreted as giving sole jurisdiction to a board of arbitration.

This position was again accepted in Woods v. Miramachi Hospital 22/, an even more recent case. There Bridges, C.J.N.B., stated that the act and the agreement did not bar a court action and, again, to refuse jurisdiction would be to hold that "an employee, who has been wrongfully dismissed, would be without remedy unless his dismissal was taken up by the union and carried by it to arbitration. I cannot believe it was the intention of the Legislature to vest such powers in a union or to prevent an employee on his dismissal from bringing an action as the plaintiff has. I do not think, however, if the dismissal of the plaintiff had been processed as a grievance that an action would lie until there had been an arbitration." 23/

The result of these cases is not as yet clear. The reports do not indicate whether the courts are permitting the action on the basis of the agreement or on some common law right, although there is some indication that it is the latter. In any event, there are several theories that would justify such intervention: (i) that the employees are third-party beneficiaries under the union-employer contract; (ii) that the individual employee's contract of hire incorporates terms negotiated by the union; or (iii) the employees are principles under the contract negotiated by the union as their agent. Undoubtedly, the courts wish to intervene in this area and will eventually select one of these.

This tendency on the part of the courts, however, is fraught with danger. Specifically, there is the difficulty of reconciling the two existing systems: for example, is it a defense by a company in a court action that the union has settled the grievance? or is the defense of

timeliness under the agreement one that can be raised in the courts? 24/ There is some ominous wording (e.g., the last sentence of Bridges above) that the procedure of arbitrations will be disregarded by the courts. If this is so, what becomes of the orderly system of dispute settlement under the collective agreement? It has been argued that union solidarity is only required in the reaching of an agreement and not in its administration. 25/ Granted there may be some difference, but at least uniformity should be achieved in the latter matter and it is a difficult choice to make to say that some valid grievances should not be settled.

Far more palatable alternatives are available in court actions: stressing the fiduciary nature of union executives, actions could be brought to compel arbitration 26/ or even to seek damages for failure to bring arbitration. 27/ Both would have the advantage of maintaining the integrity of the arbitration system while still giving more protection to individuals. With the trend of Grottoli and Woods, however, it would seem such actions will not be used with any frequency. This trend, it might be noted, seems to be extending to labour relations boards, which have hitherto promoted the arbitration process. 28/

A Proposal: Rather than permit the present trend to continue, it is suggested that the Task Force attempt to limit court actions in this area. Obviously, to obtain a speedy, inexpensive and orderly system of dispute settlement, the arbitration process must be strengthened. In so doing, however, more extensive rights must be given to individuals during this process.

Initially, therefore, the union should be given the right to meet its responsibilities, given by certification, to sift out wholly frivolous

grievances that would only clog the grievance procedure. 29/ When an individual is unhappy with the disposition he should be able to pursue to arbitration those matters which are personal to him. As Professor Blumrosen has stated: 30/ "In connection with 'critical job interests,' which include discharge and seniority, an employee has a right to have arbitration of adverse management decisions, unless the union is prepared to demonstrate in court that his claim is without merit."

In this respect, the Task Force might wish to look at s.9 (a) of the L.M.R.A. which provides that the union representative will have exclusive bargaining rights, but individuals have a right to:

Present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of the collective agreement or contract in effect:

Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

Naturally, there are some practical problems left open by this approach: 31/ who bears the costs?, who selects the arbitrator?, what is the position of the union in these cases? These problems can easily be settled although I do not wish to make recommendations in detail. I only wish to note that individuals should bear at least some portion of the expenses and that unions should be able to participate in the hearing. 32/

REFERENCES

- 1/ This point is made in Summers, Internal Relations Between Trade Unions and Their Members, 91 Lab. Rev. 175, at 187 (1965), where the author indicates the following three factors to be considered in deciding whether a union member should have a right to participate in the decisions of the union: "the first to be considered is whether participation is direct through referendum or indirect through the election of officers. ...a second and closely related factor is the remoteness of the decision-making from the individual members. ...a third factor affecting the extent of the individual's participation is the responsiveness to the desires of the members shown by the election process through which the persons to represent them are selected."
- 2/ Note, for instance, that in spite of the Landrum-Griffin "Bill of Rights", that a union may not be compelled to call a meeting prescribed by its constitution, in a suit instituted by members of that union: Yanity v. Benware, 376 F. (2d) 197 (2nd Cir. 1967). See the unanimous criticism of this decision listed in the bibliography.
- 3/ See, on this point, Carlin v. Galbraith; Cusack v. Galbraith, 20 D.L.R. (2d) 679 (N.B.C.A. 1960).
- 4/ In general, these criteria meet those established as "reasonable" under Title IV of the Landrum-Griffin Act. Although 20 per cent of the unions impose unreasonable qualification criteria, general legislation in this respect is unnecessary unless it be as part of a Code.
- 5/ See Chapter III, supra, p. 91. Section 504 Labor-Management Reporting and Disclosure Act deals with this problem.
- 6/ This sub-topic is important for two reasons. In the first place, one of the major reasons for creating the L.M.R.D.A. was the lack of responsible government within unions, caused to a great extent by oligarchical rules. When related to the second reason, the low level of participation by members in union elections, it becomes more evident why unions have become blackened in the public eye. In order to correct this situation several provisions were included in Title IV L.M.R.D.A. and various recommendations were included in the Royal Commission on Trade Unions and Employers' Associations, Cmnd. 3623, Paras. 632-47 (Supra, Chapter VI).
- 7/ Note that here, for instance, the L.M.R.D.A. does not provide for secret ballot, but where this system is used a certain procedure must be followed under s.401 (c).
- 8/ The L.M.R.D.A. chose to deal with this problem by stipulating in s.401 (h)-(i) that the Secretary may remove an elected officer "guilty of serious misconduct" on showing good cause as well as the absence of any "adequate procedure for removal", if such action of removal is sanctioned by the members in secret ballot. Unfortunately there is no enumeration of possible offences.

- 9/ See Taylor v. National Union of Seamen, [1967] 1 All E.R. 767 (Ch.).
- 10/ See Katz, Fiduciary Obligations of Union Officers Under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959, 14 Lab. L.J. 542 (1963); Clark, The Fiduciary Duties of Union Officials Under Section 501 of the L.M.R.D.A., 52 Minn. L. Rev. 437 (1967).
- 11/ See, e.g., this position made in the Interim Report of the Select Committee on Company Law (Ont. 1967), c. VII.
- 12/ The most recent study of this problem for Canada is found in Adell, Comment, 45 Can. Bar Rev. 354 (1967). For a more detailed examination of the problem, the Task Force should examine this article.
- 13/ E.g., Labour Relations Act, R.S.O. 1960, c.202, s.34 (1).
- 14/ It should be noted that this problem does not arise in England or Australia where collective agreements are not enforceable by the courts: see, e.g., Australian Agricultural Co. v. Federated Engine Drivers and Firemen's Assn., 17 C.L.R. 269 (1913). But see the recent recommendations of the Donovan Commission in this respect.
- 15/ Re International Nickel Co. and Rivando, 2 D.L.R. (2d) 700 (Ont. C.A. 1956).
- 16/ Ibid.
- 17/ See, e.g., Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. (Can. S.C., unreported); and Bradley v. Ottawa, 67 CLLC, P. 14,043 (Ont. C.A.).
- 18/ For a discussion of this in terms of United States experience, see Rose, Do the Requirements of Due Process Protect the Rights of Employees Under Arbitration Procedures?, 16 Lab. L.J. 44 (1965).
- 19/ Re Grottoli v. Lock & Son, 39 D.L.R. (2d) 128 (Ont. H.C. 1963). Cf., the United States position in Wolk, The Decline of Individual Rights, 16 Lab. L.J. 266 (1965).
- 20/ Labour Relations Act, R.S.O. 1960, c.202, s.34 (1).
- 21/ Re Grottoli, supra, ref. 19. at 129-30.
- 22/ 59 D.L.R. (2d) 280 (N.B.C.A. 1966).
- 23/ Ibid., at 295-96.
- 24/ The problems of court actions generally is discussed in Cummings, Individual Enforcement of Rights under Collective Bargaining Agreements, 13 Lab. L.J. 686 (1962).

- 25/ See Beitler, Individual's Remedies for Breach of a Collective Bargaining Agreement, 34 Geo. Wash. L. Rev. 927, at 937 (1966), where he concludes that: "The right of an individual employee to seek his own remedy has been sacrificed to the austensible needs of collective bargaining. The underlying reason for this result has been the failure of the courts to distinguish between the need for protecting the collective bargaining process and the need for a procedure by which an individual may protect his individual rights. The needs for bargaining are not the needs of grieving; but courts have been reluctant to recognize this dichotomy. Allowing an individual employee to affect his own grievance settlement when his union refuses to do so will not necessarily impair the union's bargaining position."
- 26/ See, e.g., Cummings, supra, ref. 24 at 687.
- 27/ E.g., Hornak v. Patterson, 58 D.L.R. (2d) 175 (B.C.C.A. 1966); and see Beitler, supra, ref. 25, at 934.
- 28/ See, e.g., Re Norman Beanland, OLRB Mon. Rep., Oct. 66, at 513; aff'd on re-hearing, OLRB Mon. Rep., Nov. 66, at 617.
- 29/ On this point, see Owen, The Duty of Fair Representation Revisited, 17 Lab. L.J. 749 (1966).
- 30/ Blumrosen, Individual Rights Under Collective Contracts - What Should the Rule Be?, 15 Lab. L.J. 598 (1964). Cf. Ferguson, Duty of Fair Representation, 15 Lab. L.J. 577 (1964), who says individual grievances should only be brought after a showing of unfair representation by the union. He claims to do otherwise would cause chaos in the bargaining unit and that Blumrosen's distinction is unrealistic.
- 31/ On this point, see Hanslowe, The Collective Agreement and the Duty of Fair Representation, 14 Lab. L.J. 1052 (1963), esp. at 1065-67.
- 32/ See Gray, Individual Workers and the Right to Arbitrate, 12 Lab. L.J. 816 (1961).

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77 Sup. Ct. 529
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- Vaca v. Sipes, 386 U.S. 171 (1967)
Union's Duty to Fairly Represent Its Members in Contract Grievance Procedures - The Impact of Vaca v. Sipes, 19 Syracuse L. Rev. 66 (1967); 14 U.C.L.A. L. Rev. 1351 (1967); 19 Case W. Res. L. Rev. 146 (1967); 17 Buffalo L. Rev. 165 (1967); 16 Kan. L. Rev. 120 (1967); 65 Mich. L. Rev. 374 (1966); 13 Wayne L. Rev. 602 (1967); 77 Yale L.J. 559 (1968)
- Volquardsen v. Southern Amusement Co., (La.) 156 So. 678
Rights of Employee Under Agreement Between Employer and Union, 3 Duke B. A. J. 42 (1935) (E.Z. DuBose)
- Wallace Corp. v. N.L.R.B., 65 Sup. Ct. 238
Discrimination by Labor Unions, 40 Ill. L. Rev. 149 (1945)
- Walter v. McCarvel, (Mass.) 34 N.E. (2d) 677
Right of Union to Deny Membership of Applicant, 40 Mich. L. Rev. 310 (1941) (Mills)
- Walsche v. Sherlock, (N.T.), 159 Atl. 661
Discrimination by Officers Against Members, Not Required to Exhaust Remedies Within the Union, 1 U. Det. L.J. 211 (1932) (Marsden)

Wilts and Somerset Farmers Ltd. [1928] Accountant L.R. 43

How Changes in Rules of a Society Affect Members who Have Remained Passive During the Process, 45 Scot. L. Rev. 12 (1929)

Wilson v. Hacker, 101 N.Y. Supp. (2d) 461

Labor Law - Discrimination by Union Seeking Union Shop on Basis of Sex Held "Unreasonable", 1 Buff. L. Rev. 61 (1951); 37 Va. L. Rev. 617 (1951)

Vanity v. Benware, 376 F. (2d) 197

Refusal of a Union President to Call a Meeting When Required to Do so by the Union Constitution Does not Violate a Member's Right of Assembly Under Section 101 of the Landrum-Griffin Act, 5 Houston L. Rev. 384 (1967); 81 Harv. L. Rev. 488 (1967); 16 Kan. L. Rev. 384 (1967); Wis. L. Rev. 279 (1968); 43 N.Y. U. L. Rev. 393 (1968)

Yazoo & M.V.R.R. v. Sideboard (Miss.) 133 So. 669

Contracts for Benefit of Third Party, Trade Unions, Right of Non-Member to Sue Employer for Damage Resulting from Breach of Contract with the Union, 16 Minn. L. Rev. 100 (1931)

Young v. Canadian Northern Ry. Co., 1931 A.C. 83

Labor Law - Employee's Rights Under Union-Employer Agreements, 10 N.C. L. Rev. 394 (1932) (Erb); also 26 Ill. L. Rev. 922 (1932) (Asher)

APPENDIX A

UNION SECURITY LEGISLATION

The following is a list of the federal and provincial statutes now in force relating to union security. These Acts will be cited according to jurisdiction as indicated.

Industrial Relations and Disputes Investigation Act

R.S.C. 1952, c.152.

The Alberta Labour Act

R.S.A. 1955, c.167, amended 1957, c.38; 1958, c.82; 1959, c.35; 1960, c.54 and c.80; 1964, c.41; 1966, c.13, s.94; cited as Alta. L. Act.

Labour Relations Act

R.S.B.C. 1960, c.205, amended 1961, c.31; 1963, c.20; cited as B.C.L.R. Act.

The Labour Relations Act

R.S.M. 1954, c.132, amended 1956, c.38; 1957, c.36; 1958, c.29 and c.67; 1959, c.32; 1960, c.78; 1962, c.35; 1963, c.41; 1966, c.33; cited as Man. L.R. Act.

Labour Relations Act

R.S.N.B. 1952, c.124, as amended 1953, c.21; 1955, c.57; 1956, c.43; 1959, c.56; 1960, c.45; 1960-61, c.52; cited as N.B.L.R. Act.

The Labour Relations Act

R.S.N. 1952, c.258, amended 1959, c.1; 1960, c.58; 1963, c.82; 1966, c.39; 1967, c.12; cited as Nfld. L.R. Act.

Trade Union Act

R.S.N.S. 1954, c.295, amended 1957, c.53; 1964, c.48; 1965, c.53; cited as N.S.T.U. Act.

The Labour Relations Act

R.S.O. 1960, c.202, amended 1961-62, c.68; 1963, c.70; 1964, c.53; 1966, c.76; cited as Ont. L.R. Act.

The Industrial Relations Act

S.P.E.I. 1962, c.18, as amended 1963, c.20; 1966, c.19; 1966 (2nd session), c.3; cited as P.E.I. I.R. Act.

The Labour Code

R.S.Q. 1964, c.141; cited as Que. Lab. Code.

The Trade Union Act

R.S.S. 1965, c.287, as amended 1966, c.83; cited as Sask. T.U. Act.

Provisions Allowed in Collective Agreements

INDUSTRIAL RELATIONS AND DISPUTES INVESTIGATION ACT

R.S.C. 1952, c. 152, s.6.

6. (1) Nothing in this Act prohibits the parties to a collective agreement from inserting in the collective agreement a provision requiring, as a condition of employment, membership in a specified trade union, or granting a preference of employment to members of a specified trade union.
- (2) No provision in a collective agreement requiring an employer to discharge an employee because such employee is or continues to be a member of, or engages in activities on behalf of a union other than a specified trade union, is valid.

[Most provinces include a provision similar to s.6(1) above in their equivalent statutes. See the Alta. L. Act, s.80(2); the B.C.L.R. Act, s.8; the Man. L.R. Act, s.6(2); the N.B.L.R. Act, s.5(1); the Nfld. L.R. Act, s.5(1); the N.S.T.U. Act, s.6(1); the Ont. L.R. Act, s.35(1)(a), (see below).

Legislation to the same effect as s.6(2) above is also found in most provincial labour relations statutes. See the Man. L.R. Act, s.6(3); the N.B.L.R. Act, s.5(2); the Nfld. L.R. Act, s.5(2); the N.S.T.U. Act, s.6(2); the Ont. L.R. Act, s.35(2); (see below); the P.E.I. I.R. Act, s.6.]

THE LABOUR RELATIONS ACT

R.S.N. 1952, c.258, s.5A. (1) (2) (3), (as amended).

- 5A. (1) Notwithstanding any other provisions of this or any other Act, where a person
- (a) is not a member of a union which is a party to a collective agreement but is otherwise qualified for employment by an employer who is a party to the collective agreement, and
 - (b) applies for membership in the union referred to in paragraph (a),

the employer may employ that person notwithstanding any provision of any collective agreement if the union refuses to accept that person into its membership.

- (2) Nothing contained in subsection (1) excuses an employee from complying with the constitution, rules and by-laws of a union of which he becomes a member.

- (3) Notwithstanding any provision in any other Act, any provision in the constitution, rules or by-laws of a union which is designed or operates to exclude from membership in the union a person referred to in subsection (1) is invalid.

THE LABOUR RELATIONS ACT

R.S.O. 1960, c.202, s.35(1) (a) (2) (3) (4)

35. (1) Notwithstanding anything in this Act, but subject to subsection 4, the parties to a collective agreement may include in its provisions,
- (a) for requiring, as a condition of employment, membership in the trade union that is a party to or is bound by the agreement or granting a preference of employment to members of the trade union, or requiring the payment of dues or contributions to the trade union;

(b) ...

(c) ...

- (2) No employer shall discharge an employee,
- (a) who has been expelled or suspended from membership in the trade union mentioned in clause 'a' of subsection 1; or
 - (b) to or from whom membership in the trade union mentioned in clause 'a' of subsection 1 has been denied or withheld,

because he was or is a member in another trade union or has engaged in activity against the trade union mentioned in clause 'a' of subsection 1 or on behalf of another trade union.

- (3) Subsection 2 does not apply to an employee who has engaged in unlawful activity against the trade union mentioned in clause 'a' of subsection 1 or an officer, official or agent thereof or whose activity against the trade union or on behalf of another trade union has been instigated or procured by his employer or any person acting on his employer's behalf or whose employer or a person acting on his employer's behalf has participated in such activity or contributed financial or other support to the employee in respect of such activity.
- (4) A trade union and the employer of the employees concerned shall not enter into a collective agreement that includes provisions requiring as a condition of employment, membership in the trade union that is a party to or is bound by the agreement unless the trade union has established at the time it entered into the agreement that not less than 55 per cent of the employees in the bargaining unit were members of the trade union, but this subsection does not apply,
- (a) where the trade union has been certified as the bargaining agent of the employees of the employer in the bargaining unit; or

- (b) where the trade union has been a party to or bound by a collective agreement with the employer for at least one year; or
- (c) where the employer becomes a member of an employers' organization that has entered into a collective agreement with the trade union or council of trade unions containing such a provision and agrees with the trade union or council of trade unions to be bound by such agreement; or
- (d) where the employer and his employees in the bargaining unit are engaged in the construction, alteration, decoration, repair or demolition of a building, structure, road, sewer, water or gas main, pipe line, tunnel, bridge, canal, or other work at the site thereof.

THE INDUSTRIAL RELATIONS ACT

S.P.E.I. 1962, c.18, s.7.

7. Nothing in this Act prohibits the parties to a collective agreement from inserting in the collective agreement a provision granting preference of employment to members of a specified trade union or requiring the payment of dues or contributions to a specified trade union, provided that the employer may not discharge or otherwise discriminate against an employee for non-membership, if

- (a) he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members;
- (b) he has reasonable grounds for believing that membership was denied, or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

THE TRADE UNION ACT

R.S.S. 1965, c.287, s.32 (1) (3) (4), (as amended).

32. (1) Upon the request of a trade union representing a majority of employees in any appropriate bargaining unit, the following clause shall be included in any collective bargaining agreement entered into between that trade union and the employer concerned, and, whether or not any collective bargaining agreement is for the time being in force, the said clause shall be effective and its terms shall be carried out by that employer with respect to such employees on and after the date of the trade union's request until such time as the employer is no longer required by or pursuant to this Act to bargain collectively with that trade union:

Every employee who is now or hereafter becomes a member of the union shall maintain his membership in the union as a condition of his employment, and every new employee whose employment commences hereafter shall, within thirty days after the commencement of his employment, apply for and maintain membership in the union as a condition of his employment;

and the expression "the union" in the said clause shall mean the trade union making such request.

(2) ...

(3) Where membership in a trade union or labour organization is a condition of employment and:

(a) membership is not available to an employee on the same terms and conditions generally applicable to other members; or

(b) an employee is denied membership or his membership is terminated for reasons other than the failure of the employee to tender the periodic dues, assessments and initiation fees uniformly required to be paid by all other members of the trade union as a condition of acquiring or retaining membership;

the employee, if he tenders payment of the periodic dues, assessments and initiation fees uniformly required as a condition of acquiring and maintaining membership:

(c) shall be deemed to maintain his membership for purposes of this section; and

(d) shall not lose his membership for purposes of this section for failure to pay any dues, assessment and initiation fees that are not uniformly required of all members or that in their application discriminate against any member or members.

(4) Subsection (3) does not apply to an employee who:

(a) has engaged in activity against the trade union; or

(b) has engaged in activity on behalf of another trade union;

if the employer, employers' association or a person acting on behalf of an employer or employers' association has instigated the activity or participated in the activity or contributed financial or other support to the employee in respect of the activity.

Check-off Legislation

THE ALBERTA LABOUR ACT

R.S.A. 1955, c.167, s.101, (as amended).

101. (1) An employee may by order in writing signed by him authorize his employer to apply any part of the moneys due to the employee to the payment of any amount payable by that employee to any other person for union dues and initiation fee not to exceed an amount equivalent to one month's union dues.
- (2) The employer shall from the moneys so due make the payments as authorized by the order, and such order
- (a) is effective only for the amounts specified therein, and
 - (b) continues in force for a period of three months and thereafter until revoked in writing by the employee.
- (3) The employer at least once a month shall remit to the trade union named in the order
- (a) the dues deducted, and
 - (b) a written statement of the name of the employee for whom the deduction was made, and of the amount of each deduction, until the order is revoked in writing signed by the employee and delivered to the employer.
- (4) Upon receipt of a revocation of an order to deduct union dues the employer shall immediately give a copy of the revocation to the trade union concerned.

LABOUR RELATIONS ACT

R.S.B.C. 1960, c.205, s.9, (as amended).

9. (1) Every employer shall honour a written assignment of wages to a trade union certified under this Act, except where the assignment is declared null and void by a Judge or is revoked by the assignor.
- (2) An assignment pursuant to subsection (1) shall be substantially in the following form: -
- To [name of employer].
- Until this authority is revoked by me in writing, I hereby authorize you to deduct from my wages and to pay to [name of the certified trade union] fees in the amounts following: -
- (1) Initiation fees in the amount of \$
 - (2) Dues of \$ per
- (3) Except where an assignor of wages revokes the assignment by giving the employer written notice of the revocation, or except where a Judge declares an assignment to be null and void, the

employer shall remit at least once each month, to the trade-union certified under this Act and named in the assignment as assignee, the fees and dues deducted, together with a written statement containing the names of the employees for whom the deductions were made and the amount of each deduction.

- (4) If an assignment is revoked, the employer shall give a copy of the revocation to the assignee.
- (5) Notwithstanding subsections (1), (2) and (3), there shall be no financial responsibility on the part of an employer for fees or dues of an employee unless there are sufficient unpaid wages of that employee in the employer's hands.
- (6)
 - (a) No employer and no one acting on behalf of an employer shall refuse to employ or to continue to employ a person and no one shall discriminate against a person in regard to employment only because that person refuses to make a contribution or expenditure to or on behalf of any political party or to or on behalf of a candidate for political office.
 - (b) No trade-union and no person acting on behalf of a trade-union shall refuse membership to or refuse to continue membership of a person in a trade union and no one shall discriminate against a person in regard to membership in a trade union or in regard to employment only because that person refuses to make or makes a contribution or expenditure, directly or indirectly, to or on behalf of any political party or to or on behalf of a candidate for political office.
 - (c)
 - (i) No trade union and no person acting on behalf of a trade union shall directly or indirectly contribute to or expend on behalf of any political party or to or on behalf of any candidate for political office any moneys deducted from an employee's wages under subsection (1) or a collective agreement, or paid as a condition of membership in the trade union.
 - (ii) Remuneration of a member of a trade union for his services in an official union position held by him while seeking election or upon being elected to public office is not a violation of this clause.
 - (d) Notwithstanding any other provisions of this Act or the provisions of any collective agreement, unless the trade union delivers to the employer who is in receipt of an assignment under subsection (1) or who is party to a collective agreement, a statutory declaration, made by an officer duly authorized in that behalf, that the trade union is complying with and will continue to comply with clause (c) during the term of the assignment or during the term of the collective agreement, neither the employer nor a person acting on behalf of the employer shall make any deduction whatsoever from the wages of an employee on behalf of the trade union.

- (e) Any moneys deducted from the wages of an employee and paid to a trade union that does not comply with this subsection are the property of the employee, and the trade-union is liable to the employee for any moneys so deducted.

THE LABOUR RELATIONS ACT

R.S.N. 1952, c.258, s.6, (as amended).

6. (1) Every employer shall honour a written assignment of wages to a trade union certified as the bargaining agent.
- (2) An assignment pursuant to subsection (1) shall be substantially in the following form: -
To [name of employer]
- I hereby request you to deduct from my wages and pay to [name of trade union] fees in the amounts following:
- (1) Initiation fee in the amount of \$
(2) Dues of \$ per
- (3) Unless the assignment is revoked in writing delivered to the employer, the employer shall remit the dues deducted to the trade union named in the assignment at least once each month together with a written statement of the names of the employees for whom the deductions were made and the amount of each deduction.
- (4) If an assignment is revoked, the employer shall give notice thereof to the assignee.
- (5) Notwithstanding anything contained in subsections (1), (2) and (3), there shall be no financial responsibility on the part of an employer for fees or dues of an employee unless there are sufficient unpaid wages of that employee in the employer's hands.

TRADE UNION ACT

R.S.N.S. 1954, c.295, s.67.

67. (1) Every employer shall honour a written assignment of wages to a trade union; provided in the case of a trade union which has been certified as a bargaining agent:
- (a) the trade union makes application to the Minister for the taking of a vote in respect of such assignment;
and
- (b) upon a vote taken by ballot at times and under conditions fixed by the Minister, a majority of the eligible voters vote in favour of the making of such assignment; and provided in the case of a trade union which has not been certified as a bargaining agent:
- (c) the officers of the trade union thereunto duly authorized by its members make application to the Minister for the taking of a vote in respect of such assignment; and

- (d) upon a vote taken by ballot at times and under conditions fixed by the Minister, a majority of the eligible voters vote in favour of the making of such assignment.
- (2) In this section, "eligible voters" means;
 - (i) in the case of paragraph (b) of subsection (1) employees of the employer who are members of a trade union and are in the unit for which the union has been so certified; and
 - (ii) in the case of paragraph (d) of subsection (1) employees of the employer who are members of the trade union and are in a unit which the Minister has designated as the appropriate unit for the purposes of such vote.
- (3) Without limiting the form of assignment and without restricting the meaning of subsection (1), an assignment substantially in the form following shall be deemed to be an assignment for the purposes of this Section:

To [name of employer]

Until this authority is revoked by me in writing, I hereby authorize you to deduct from my wages and pay to [name of employees' organization or number and name of local union] fees in the amounts following:

- (1) Initiation fees in the amount of \$
- (2) Dues of \$ per

or such other amount as is fixed from time to time as dues by or in accordance with the constitution or by-laws of [name of employees' organization or number and name of local union].

- (4) Unless the assignment is revoked in writing delivered to the employer, the employer shall remit the dues deducted to the union or organization named in the assignment at least once each month, together with a written statement of the names of the employees for whom the deductions were made and the amount of each deduction.
- (5) If an assignment is revoked, the employer shall give a copy of the revocation to the assignee.

THE INDUSTRIAL RELATIONS ACT

S.P.E.I. 1962, c.18, s.48, (as amended).

- 48. (1) Nothing in this Act shall prevent the parties to a collective agreement from including therein provision for check-off of union dues.
- (2) Where no such clause exists in a collective agreement, such deductions shall be made by the employer only

- (a) if the officers of such trade union thereunto duly authorized by its members make application to the Minister of Labor for the taking of a vote to ascertain the wishes of the employees of such industry in respect of such deductions; and
 - (b) if, upon a vote taken by ballot at times and under conditions fixed by the Minister of Labor, a majority of the employees in the unit vote in favor of the making of such deductions; and
 - (c) if the individual employee being a member of such trade union makes to the employer a signed written request that such deductions be made from the wages due to him therein indicating the name of the person to whom such deductions shall be paid.
 - (d) any written request made by the employee under the provisions of subsection (c) hereof may not be revoked within six months from the date thereof.
- (3) Notwithstanding anything contained in subsections (1) and (2) hereof, no employer shall be required to deduct any amount which the employee, or the trade union, shall have assigned to the support of, or to be paid to, any political party, and any written authorization for deduction to be filed by the employee with the employer shall certify that no part of the amount required to be deducted shall be used by him, or by the trade union, for that purpose.
- (4) Unless the assignment is revoked in writing delivered to the employer, the employer shall remit the dues deducted to the union or organization named in the assignment at least once each month, together with a written statement of the names of the employees for whom the deductions were made and the amount of each deduction.
- (5) If an assignment is revoked, the employer shall give a copy of the revocation to the assignee.

THE LABOUR CODE

R.S.Q. 1941, c.141, s.38.

38. An employer must honour the written voluntary and revocable authorization given by an employee who is a member of a certified association to withhold monthly a stated amount as an assessment to be taken from his salary for the benefit of the association.

Remittance

The employer must remit monthly to the certified association the amounts so withheld with a statement indicating the amount taken from each employee and the employee's name.

Copy of Revocation

If he receives a revocation, he must send a copy thereof to the association.

THE TRADE UNION ACT

R.S.S. 1965, c.287, ss.5(1), (as amended) 29.

5. The board shall have power to make orders: . . .

(1) excluding from an appropriate unit of employees an employee where the Board finds, in its absolute discretion, that the employee objects:

(i) to joining or belonging to a trade union; or

(ii) to paying dues and assessments to a trade union;

as a matter of conscience based on religious training or belief during such period that the employee pays:

(iii) to a charity mutually agreed upon by the employee and the trade union that represents a majority of the employees in the appropriate unit; or

(iv) where agreement cannot be reached by these parties, to a charity designated by the board;

an amount at least equal to the amount of dues and assessments that a member of that trade union is required to pay to the trade union during such period;

29. Upon the request in writing of an employee, and upon request of a trade union representing the majority of employees in any bargaining unit of his employees, the employer shall deduct and pay in periodic payments out of the wages due to the employee, to the person designated by the trade union to receive the same, the union dues of the employee, and the employer shall furnish to that trade union the names of the employees who have given such authority. Failure to make payments and furnish information required by this section shall be an unfair labour practice.

APPENDIX B

FAIR EMPLOYMENT PRACTICES ACTS

The following is a list of the federal and provincial statutes now in force relating to fair employment practices. These Acts will be cited according to jurisdiction as indicated.

Canada Fair Employment Practices Act

S.C. 1952 53, c.19, cited as The Federal Act.

Human Rights Act

S.A. 1966, c.39.

Fair Employment Practices Act

R.S.B.C. 1960, c.137.

The Fair Employment Practices Act

R.S.M. 1954, c.81, as amended 1956, c.20.

Fair Employment Practices Act

S.N.B. 1956, c.9.

See Human Rights Act, S.N.B. 1967, c.13, assented to May 19, 1967, effective on proclamation.

Human Rights Act

Stats. N.S. 1963, c.5.

The Ontario Human Rights Code

S.O. 1961 62, c.93; as amended 1965, c.85.

Employment Discrimination Act

R.S.Q. 1964, c.142.

The Fair Employment Practices Act

R.S.S. 1965, c.293.

Definitions

CANADA FAIR EMPLOYMENT PRACTICES ACT

S.C. 1952 53, c.19, s.2(c), (g), (h), (i).

2. In this Act, ...

(c) "employee" means any person employed by an employer; ...

(g) "national origin" includes nationality and ancestry;

(h) "person" includes employment agency, trade union, and employers' organization; and

(i) "trade union" means any organization of employees formed for the purpose of regulating relations between employees and employers.

[Of the 3 Provinces which include a definition of "employee" in their fair employment practices legislation, only Alberta's definition is the same as s.2(c) above. See "APPLICATION TO DOMESTIC SERVANTS" below. The Manitoba and Quebec definitions of "employee" are set out below. S.1(d) of the New Brunswick Act also contains the same definition of "national origin" as s.2 (g) of the Federal Act. "Person" is defined identical to the Federal Act in the British Columbia Act, s.2(1), the Manitoba Act, s.2(i) and the Nova Scotia Act, s.2(h), whereas the Alberta Act, Part 4, s.26(e), the New Brunswick Act, s.1(e), the Ontario Code, Part V, s.18(g) and the Saskatchewan Act, s.2(g) while defining "person" in the same manner also include a reference to the Interpretation Act (i.e. "person", in addition to the extended meaning given it by the Interpretation Act, includes...). The definition of "trade union" used in the Federal Act is not found in any of the provincial statutes dealing with unfair employment practices.]

ALBERTA HUMAN RIGHTS ACT

S.A. 1966, c.39, Part 4, s.26(f).

26. In this Act, ...

- (f) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers.

[Definitions identical to s.26(f) of the above Act are found in the British Columbia Act, s.2(1), the Manitoba Act, s.2(j), the New Brunswick Act, s.1(f), the Nova Scotia Act, s.2(i), and the Ontario Code, Part V, s.18 (h). To the same effect see s.2(h) of the Saskatchewan Act.]

THE MANITOBA FAIR EMPLOYMENT PRACTICES ACT

R.S.M. 1954, c.81, s.2(d).

2. In this Act, ...

- (d) "employee" means any person who is in receipt of, or entitled to, compensation for labour or services performed for another, but does not include an independent contractor.

QUEBEC EMPLOYMENT DISCRIMINATION ACT

R.S.Q. 1964, c.142, s.1(a), (c), (d).

1. In this Act, unless the context otherwise requires, the following words mean;

- (a) "discrimination" - any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; but any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination; ...

- (c) "employee" - a person who works for an employer and for remuneration, but the word does not include:
- (1) a person employed as manager, superintendent, foreman or representative of the employer in his relations with his employees;
 - (2) a director or officer of a corporation;
 - (3) a domestic servant;
- (d) "association of employees" - a group of employees incorporated as a professional syndicate, union, brotherhood or otherwise, having as its objects the study, safe-guarding and development of the economic, social and educational interests of its members and particularly the negotiation and application of collective labour agreements;

. . .

Discrimination and Membership in a Trade Union

CANADA FAIR EMPLOYMENT PRACTICES ACT

S.C. 1952-53, c.19, s.4(3), (4), (6).

4. (3) No trade union shall exclude any person from full membership or expel or suspend or otherwise discriminate against any of its members or discriminate against any person in regard to his employment by any employer, because of that person's race, national origin, colour or religion.

(4) No employer or trade union shall discharge, expel or otherwise discriminate against any person because he has made a complaint or given evidence or assisted in any way in respect of the initiation or prosecution of a complaint or other proceeding under this Act.

...

(6) Whenever any question arises under this section as to whether a trade union discriminates contrary to this section, no presumption shall be made or inference drawn from the name of the trade union.

[Legislation identical to s.4(3) and 4(4) of the above Act, is found in s.4(3) and s.4(4) of the Manitoba Act and s.3(3) and 3(4) of the New Brunswick Act. Legislation to the same affect as s.4(3) of the Federal Act, is found in Part 1, s.7 of the Alberta Act, s.4 of the British Columbia Act, and s.4(2) of the Ontario Code. S.6(3) of the Nova Scotia Act and s.5 of the Saskatchewan Act are similar to s.4(3) of the Federal Act, but these sections include "religious creed" and "ethnic origin" in addition to the other prohibited areas of discrimination in s.4(3). Similarly, Part 1, s.8 of the Alberta Act is like s.4(4) above but s.8 also includes "evict" and "suspend" as prohibited practices.]

HUMAN RIGHTS ACT

S.N.B. 1967, c.13, assented to May 19, 1967, effective on proclamation.

4. (1) No employer or person acting on behalf of an employer shall refuse to employ or to continue to employ any person or discriminate against any person with regard to employment or any term or condition of employment because of his race, creed, colour, nationality, ancestry or place of origin.

(2) No trade union shall exclude from membership or expel or suspend any person or member or discriminate against any person or member because of race, creed, colour, nationality, ancestry, or place of origin.

[The above N.B. Act, in addition to section 4, incorporates the provisions regarding fair employment practices presently found in the Fair Employment Practices Act of N.B. which it will repeal on being proclaimed in force.]

QUEBEC EMPLOYMENT DISCRIMINATION ACT

R.S.Q. 1964, c.142, s.3.

3. No association of employees or employers' association shall resort to discrimination in admitting, suspending or expelling a member.

[See "DEFINITIONS" above for the meaning of "discrimination".]

Penalties

CANADA FAIR EMPLOYMENT PRACTICES ACT

S.C. 1952-53, c.19, s.6.

6. Every person who does anything prohibited by this Act or who refuses or neglects to do anything required by this Act is guilty of an offence, and except where some other penalty is by this Act provided for the act, refusal or neglect, is liable on summary conviction.

...

- (b) if a corporation, trade union, employers' organization or employment agency, to a fine not exceeding five hundred dollars.

[The Manitoba Act s.6, the New Brunswick Act, s.8, the Nova Scotia Act, s.16(b), the Ontario Code, Part IV s. 14(1) (b) and the Saskatchewan Act, s.14(b) also provide for a maximum fine of \$500 for an offence under this respective statute. S.8 of the British Columbia Act permits fines up to \$100. Under Part 3, s.18(1) (b) of the Alberta Act, maximum fines of \$500 for the first offence and \$1000 for second and subsequent offences may be levied.]

Application to Domestic Servants

[Each of the Provincial Statutes dealing with unfair employment practices excludes "a domestic employed in private homes" from the operation of its relevant sections. See the Alberta Act, Part 1, s.6(a); the British Columbia Act, s.2(2); the Manitoba Act, s.5; the New Brunswick Act, s.2(2) (a); the Nova Scotia Act, s.6(5) (a); the Ontario Code, Part 1, s.4(4) (a); the Quebec Act, s.1 (c) (3).]

SASKATCHEWAN FAIR EMPLOYMENT PRACTICES ACT

R.S.S. 1965, c.295, s.2(b).

2. In this Act; ...

(b) "employee" means a person employed by an employer but does not include an employee employed in a private home or living in the home of his employer;

APPENDIX C

EQUAL PAY FOR WOMEN LEGISLATION

The following is a list of the federal and provincial statutes now in force relating to equal pay for women. These Acts will be cited according to jurisdiction.

Female Employees Equal Pay Act

S.C. 1956, c.38.

The Alberta Labour Act

R.S.A. 1955, c.167; amended 1957, c.38; 1958, c.82; 1959, c.35; 1960, c.54 and c.80; 1964, c.41; 1966, c.13, s.94.

Equal Pay Act

R.S.B.C. 1960, c.131.

The Equal Pay Act

S.M. 1956, c.18; amended 1962, c.66.

Female Employees Fair Remuneration Act

S.N.B. 1960-61, c.7.

Human Rights Act

Stats. N.S. 1963, c.5; as amended 1967, c.91.

The Ontario Human Rights Code

S.O. 1961-62, c.93; as amended 1965, c.85.

The Equal Pay Act

S.P.E.I. 1959, c.11; as amended 1962, c.14; 1967, Bill 31.

The Equal Pay Act

R.S.S. 1965, c.294.

Discrimination Against Female Employees Prohibited

FEMALE EMPLOYEES EQUAL PAY ACT

S.C. 1956, c.38, s.4

4. (1) No employer shall employ a female employee for any work at a rate of pay that is less than the rate of pay at which a male employee is employed by that employer for identical or substantially identical work.
- (2) Subject to subsection (3), for the purposes of subsection (1), work for which a female employee is employed and work for which a male employee is employed shall be deemed to be identical or

substantially identical if the job, duties or services the employees are called upon to perform are identical or substantially identical.

- (3) Payment to a female employee at a rate of pay less than the rate of pay at which a male employee is employed does not constitute a failure to comply with this section, if the difference between the rates of pay is based on length of service or seniority, on location or geographical area of employment or on any other factor other than sex, and, in the opinion of the Fair Wage Officer, Referee, court, judge or magistrate, the factor on which the difference is based would normally justify such difference in rates of pay.

[Legislation similar to s.4(1) and (2) of the above Act is found in Part VI, s.109(1) and (2) of The Alberta Labour Act.]

EQUAL PAY ACT

R.S.B.C. 1960, c.131, ss.2,3.

2. In this Act, unless the context otherwise requires, ...

"establishment" means a place of business or the place where an undertaking or a part thereof is carried on; ...

3. (1) No employer and no person acting on his behalf shall discriminate between his male and female employees by paying a female employee at a rate of pay less than the rate of pay paid to a male employee employed by him for the same work done in the same establishment.
- (2) A difference in the rate of pay between a female and a male employee based on any factor other than sex does not constitute a failure to comply with this section.

[Those Acts defining "establishment" do so identical to British Columbia Equal Pay Act above. See the Manitoba Equal Pay Act, s.2(d); the New Brunswick Female Employees Fair Remuneration Act, s.1(a); the Nova Scotia Human Rights Act, s.2(e); the Ontario Human Rights Code, s.18(d); the P.E.I. Equal Pay Act, s.1(b); the Saskatchewan Equal Pay Act, s.2(c).

S.3(1) of the above Act is identical to s.3(1) of the Female Employees Fair Remuneration Act of New Brunswick and legislation to the same effect is found in the Nova Scotia Human Rights Act, s.7(1) and the Ontario Human Rights Code, s.5(1). S. 3(1) of the Saskatchewan Equal Pay Act is similar except that instead of using "the same work" as the guide to equal pay it uses "work of comparable character" and s.2(1) of the P.E.I. Equal Pay Act reads: "... employed by him substantially for the same work...."

Legislation identical to s.3(2) of the British Columbia Equal Pay Act is found in the New Brunswick Female Employees Fair Remuneration Act, s.3(2), the Nova Scotia Human Rights Act, s.7(2), The Ontario Human Rights Code, s.5 (2), the P.E.I. Equal Pay Act and the Saskatchewan Equal Pay Act, s.3(2). The Alberta Labour Act, Part VI, s.109(3) in addition to the words in s.3(2) of the British Columbia Act concludes with the following clause: "...if the factor on which the difference is based would normally justify such a difference".]

THE EQUAL PAY ACT

S.M. 1956, c.18, s.3(1).

3. (1) Subject as herein provided, no employer and no person acting on behalf of an employer, shall discriminate between the male and female employees of the employer by paying to the employees of one sex wages on a scale different from that on which wages are paid to employees of the other sex in the same establishment, if the work required of, and done by, employees of each sex is identical or substantially identical.

[Legislation equivalent to s.4(2) and (3) of the above federal Act is contained in s.5(2) and (3) of The Manitoba Equal Pay Act except that the Manitoba Act sets out two additional specific situations in which wage differences are permitted; i.e., differences based on "performance" and "capacity".]

Provisions Regarding Collective Agreements

FEMALE EMPLOYEES EQUAL PAY ACT

S.C. 1956, c.38, s.13.

13. (1) Where an employer is bound by a collective agreement that contains an equal pay provision and contains, or is deemed under subsection (2) of section 19 of the Industrial Relations and Disputes Investigation Act to contain, a grievance settlement provision, no complaint shall be made or information laid in respect of any employment by that employer of a female employee who is bound by the collective agreement.
- (2) In this section
- (a) "equal pay provision" means a provision in a collective agreement substantially to the same effect as section 4; and
 - (b) "grievance settlement provision" means a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by a collective agreement or on whose behalf it was entered into, concerning its meaning or violation.

THE EQUAL PAY ACT

S.M. 1956, c.18, ss.6, 10.

6. After this Act comes into force no employer, and no trade union or society acting as bargaining agent for employees, shall negotiate or enter into a collective agreement providing for scales of wages forbidden by this Act.

10. Where an employer is bound by a collective agreement to which The Labour Relations Act or Part XVIII of The Public Schools Act applies no complaint shall be made or information laid against that employer for a breach of any provision of this Act in respect of any employment by that employer of any employee who is bound by the collective agreement; but this section does not prohibit the making of a complaint or the laying of an information against an employer and a trade union jointly for a breach of section 6; and, for that purpose, a breach of section 6 shall be deemed to be an offence under The Labour Relations Act to which sections 45 and 46 of that Act apply, and under The Public Schools Act to which section 400 of that Act applies.

FEMALE EMPLOYEES FAIR REMUNERATION ACT

S.N.B. 1960-61, c.7, s.2(2).

2. (2) The provisions of this Act supersede the provisions of any written contract of employment or collective agreement which are inconsistent with the provisions of this Act, in so far as they are so inconsistent.

APPENDIX D

TRUSTEE LEGISLATION

Federal Legislation

MARITIME TRANSPORTATION UNIONS TRUSTEES ACT

S.C. 1963, c.17, ss.7(1), (2), (3), (f), (4), (5), (6), 11.

[This Act was passed as a result of recommendations included in the July 6, 1963 Commission Report of Mr. Justice T. G. Norris (entitled a Report of Industrial Inquiry Commission on the Disruption of Shipping). The Act in effect suspends for a certain period, which was extended to Dec. 31, 1967, the right of certain unions to direct their own affairs and operations. Management and control of the maritime transportation unions, and of the maritime transportation locals of unions, in Canada were placed in the hands of trustees until such time as the seamen could assume "by peaceful means the democratic management and control of their labour organizations" thus seeking to bring an orderly end to the chaotic conditions existing in the maritime shipping industry. Those sections of the Act which are relevant to the rights of the individual seaman are reproduced below.]

7. (1) The management and control of the maritime transportation unions is hereby vested in the Trustees who shall, in accordance with this Act, manage and control each of the maritime unions and do all things necessary or advisable for the return of the management and control of each of the maritime unions to duly elected and responsible officers of such unions at the earliest date consistent with the national and public interests of Canada.
- (2) Notwithstanding any Act, letters patent, charter, by-laws or other constitution of any maritime union and without limiting the generality of subsection (1), the Trustees may
- (a) promote the establishment of advisory councils of seamen and their representatives to advise and aid the trustees in carrying out the duties of the trustees under this act and promote the establishment of joint advisory councils of seamen and ship owners and their representatives for the purpose of developing good relations between employees and employers, safety in the industry and other labour relations except those ordinarily associated with collective bargaining;
 - (b) recommend to the members of a maritime union changes in the constitution or by-laws of the union that are calculated to ensure more efficient, effective or direct control of the union by the members thereof or to advance the general welfare of the union, and for the purpose of implementing any such recommendation exercise all the powers of the officers of the union under the constitution and by-laws of such union;

- (c) designate officers or members of a maritime union as bargaining committees to negotiate collective agreements on behalf of the members of the union when bargaining committees have not been otherwise established under the constitution or by-laws of the union, and to tender advice to bargaining committees of a maritime union negotiating collective agreements on behalf of the members of the union;
 - (d) remove or suspend any officer or employee of a maritime union and appoint during pleasure officers and employees of such maritime union, and subject to subsection (4) fix the salaries to be paid to any person so appointed; and
 - (e) sue or be sued in the name of a maritime union in any case where the maritime union may sue or be sued.
- (3) In the management and control of a maritime union the Trustees may, in the manner and to the extent that the same may be done under the constitution or by-laws of the maritime union by the duly elected officers thereof, exercise the following powers, that is to say:
- ...
- (f) generally to do all such things as the officers of the union may do under the constitution and by-laws of the union.
- (4) Where the constitution or by-laws of a maritime union prescribes the salary to be paid to an officer of the union, the Trustee shall not fix the salary for a person appointed by the Trustees to that office in an amount in excess of the salary so prescribed by such constitution or by-laws; and after the commencement of this Act no amendment to the constitution or by-laws of a maritime union that decreases the salary attached to any office in the union is valid unless the same is approved by the Trustees.
- (5) In respect of a maritime union the Trustees may from time to time delegate in writing any or all of the duties and powers of the Trustees to any person appointed by the Trustees, or elected, as an officer of the union; and such officers may perform the duties and exercise the powers so delegated subject to such terms and conditions, if any, as the Trustees may set out in the instrument of delegation.
- (6) Nothing in this act shall be construed to restrict any right of a maritime union or the members thereof to bargain collectively and to implement the provisions of the Industrial Relations and Disputes Investigation Act in any labour dispute.

11. (1) Subject to this section, all property held by any person for the benefit of a maritime union or members of a maritime union is hereby vested in the Trustees for the like objects and upon the like conditions as the property was held by such person.
- (2) This section does not apply to any property held by a trust company or insurance company under or pursuant to any agreement providing a plan of welfare, pension or insurance benefits for members of a maritime union or to any property declared by order of the Governor in Council to be excluded from the application of this section.

Provincial Legislation

THE LABOUR RELATIONS ACT

R.S.O. 1960, c.202, s.60.

60. (1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister from time to time requires.
- (2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.

APPENDIX E

SELECTED LEGISLATION

ENGLAND

[The legislation reproduced below is taken from statutes in force on December 31, 1966.]

THE TRADE UNION ACT

1871, 34 & 35 Vict., c.31, ss.11, 12, 16, 23.

11. Every treasurer or other officer of a trade union registered under this Act, at such times as by the rules of such trade union he should render such account as herein-after mentioned, or upon being required so to do, shall render to the trustees of the trade union, or to the members of such trade union, at a meeting of the trade union, a just and true account of all moneys received and paid by him since he last rendered the like account, and of the balance then remained in his hands, and of all bonds or securities of such trade union, which account the said trustees shall cause to be audited by some fit and proper person or persons by them to be appointed; ...

12. If any officer, member, or other person being or representing himself to be a member of a trade union registered under this Act, or the nominee, executor, administrator, or assignee of a member thereof, or any person whatsoever, by false representation or imposition obtain possession of any moneys, securities, books, papers, or other effects of such trade union, or, having the same in his possession, wilfully withhold or fraudulently misapply the same, or wilfully apply any part of the same to purposes other than those expressed or directed in the rules of such trade union, or any part thereof, the court of summary jurisdiction for the place in which the registered office of the trade union is situate, upon a complaint made by any person on behalf of such trade union, or by the registrar...may, by summary order, order such officer, member, or other person to deliver up all such moneys, securities, books, papers, or other effects to the trade union, or to repay the amount of money applied improperly, and to pay, if the court think fit, a further sum of money not exceeding twenty pounds, together with costs not exceeding twenty shillings; and, in default of such delivery of effects, or repayment of such amount of money, or payment of such penalty and costs aforesaid, the said court may order the said person so convicted to be imprisoned, with or without hard labour, for any time not exceeding three months: Provided, that nothing herein contained shall prevent the said trade union... from proceeding by indictment against the said party; provided also that no person shall be proceeded against by indictment if a conviction shall have been previously obtained for the same offence under the provisions of this Act.

16. A general statement of the receipts, funds, effects, and expenditure of every trade union registered under this Act shall be transmitted to the registrar before the first day of June in every year, and shall show fully the assets and liabilities at the date, and the receipts and expenditure

during the year preceding the date to which it is made out, of the trade union; and shall show separately the expenditure in respect of the several objects of the trade union, and shall be prepared and made out up to such date, in such form, and shall comprise such particulars, as the registrar may from time to time require; and every member of, and depositor in, any such trade union shall be entitled to receive, on application to the treasurer or secretary of that trade union a copy of such general statement, without making any payment for the same.

...

Every trade union which fails to comply with or acts in contravention of this section, and also every officer of the trade union so failing, shall each be liable to a penalty not exceeding five pounds for each offence.

...

23. In this Act -

...

The term "trade union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade: Provided that this Act shall not affect -

1. Any agreement between partners as to their own business;
2. Any agreement between an employer and those employed by him as to such employment;
3. Any agreement in consideration of the sale of the good will of a business or of instruction in any profession, trade, or handicraft.

TRADE UNION ACT AMENDMENT ACT

1876, 39 & 40 Vict. c.22, s.9.

9. A person under the age of twenty-one, but above the age of sixteen, may be a member of a trade union, unless provision be made in the rules thereof to the contrary, and may, subject to the rules of the trade union, enjoy all the rights of a member except as herein provided, and execute all instruments and give all acquitances necessary to be executed or given under the rules, but shall not be a member of the committee of management, trustee, or treasurer of the trade union.

THE TRADE UNION ACT

1913, 2 & 3 Geo. 5, c.30, ss.1, 2(1), 3(1), (2), (3), 4(1), 5, 6.

1. (1) The fact that a combination has under its constitution objects or powers other than statutory objects within the meaning of this Act shall not prevent the combination being a trade union for the purposes of the Trade Union Acts, 1871 to 1906, so long as

the combination is a trade union as defined by this Act, and, subject to the provisions of this Act as to the furtherance of political objects, any such trade union shall have power to apply the funds of the union for any lawful objects or purposes for the time being authorised under its constitution.

- (2) For the purposes of this Act, the expression "statutory objects" means the objects mentioned in section sixteen of the Trade Union Act Amendment Act, 1876, namely, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business, and also the provision of benefits to members.

2. (1) The expression "trade union" for the purpose of the Trade Union Acts, 1871 to 1906, and this Act, means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects: Provided that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by this Act so long as it continues to be so registered.

3. (1) The funds of a trade union shall not be applied, either directly or in conjunction with any other trade union, association, or body, or otherwise indirectly, in the furtherance of the political objects to which this section applies (without prejudice to the furtherance of any other political objects), unless the furtherance of those objects has been approved as an object of the union by a resolution for the time being in force passed on a ballot of the members of the union taken in accordance with this Act for the purpose by a majority of the members voting; and where such a resolution is in force, unless rules, to be approved, whether the union is registered or not, by the Registrar of Friendly Societies, are in force providing -

- (a) That any payments in the furtherance of those objects are to be made out of a separate fund (in this Act referred to as the political fund of the union), and for the exemption in accordance with this Act of any member of the union from any obligation to contribute to such a fund if he gives notice in accordance with this Act that he objects to contribute; and
- (b) That a member who is exempt from the obligation to contribute to the political fund of the union shall not be excluded from any benefits of the union, or placed in any respect either directly or indirectly under any disability or at any disadvantage as compared with other members of the union (except in relation to the control or management of the political fund) by reason of his being so exempt, and that contribution to the political fund of the union shall not be made a condition for admission to the union.

- (2) If any member of a trade union alleges that he is aggrieved by a breach of any rule made in pursuance of this section, he may complain to the Registrar of Friendly Societies, and the Registrar of Friendly Societies, after giving the complaint and any representative of the union an opportunity of being heard, may, if he considers that such a breach has been committed, make such order for remedying the breach as he thinks just under the circumstances; and any such order of the Registrar shall be binding and conclusive on all parties without appeal and shall not be removable into any court of law or restrainable by injunction, and on being recorded in the county court, may be enforced as if it had been an order of the county court. ...
- (3) The political objects to which this section applies are the expenditure of money -
- (a) on the payment of any expenses incurred either directly or indirectly by a candidate or prospective candidate for election to Parliament or to any public office, before, during, or after the election in connexion with his candidature or election; or
 - (b) on the holding of any meeting or the distribution of any literature or documents in support of any such candidate or prospective candidate; or
 - (c) on the maintenance of any person who is a member of Parliament or who holds a public office; or
 - (d) in connexion with the registration of electors or the selection of a candidate for Parliament or any public office; or
 - (e) on the holding of political meetings of any kind, or on the distribution of political literature or political documents of any kind, unless the main purpose of the meetings or of the distribution of the literature or documents is the furtherance of statutory objects within the meaning of this Act.

The expression "public office" in this section means the office of member of any county, county borough, district, or parish council, or board of guardians, or of any public body who have power to raise money, either directly or indirectly, by means of a rate.

...

4. (1) A ballot for the purposes of this Act shall be taken in accordance with rules of the union to be approved for the purpose, whether the union is registered or not, by the Registrar of Friendly Societies, but the Registrar of Friendly Societies shall not approve any such rules unless he is satisfied that every member has an equal right, and, if reasonably possible, a fair opportunity of voting, and that the secrecy of the ballot is properly secured.

...

5. (1) A member of a trade union may at any time give notice, in the form set out in the Schedule to this Act or in a form to the like effect, that he objects to contribute to the political fund of the union, and, on the adoption of a resolution of the union approving the furtherance of political objects as an object of the union, notice shall be given to the members of the union acquainting them that each member has a right to be exempt from contributing to the political fund of the union, and that a form of exemption notice can be obtained by or on behalf of a member either by application at or by post from the head office or any branch office of the union or the office of the Registrar of Friendly Societies.

Any such notice to members of the union shall be given in accordance with rules of the union approved for the purpose by the Registrar of Friendly Societies, having regard in each case to the existing practice and to the character of the union.

- (2) On giving notice in accordance with this Act of his objection to contribute a member of the union shall be exempt, so long as his notice is not withdrawn, from contributing to the political fund of the union as from the first day of January next after the notice is given, or, in the case of a notice given within one month after the notice given to members under this section on the adoption of a resolution approving the furtherance of political objects, as from the date on which the member's notice is given.

6. Effect may be given to the exemption of members to contribute to the political fund of a union either by a separate levy of contributions to that fund from the members of the union who are not exempt, and in that case the rules shall provide that no moneys of the union other than the amount raised by such separate levy shall be carried to that fund, or by relieving any members who are exempt from the payment of the whole or any part of any periodical contributions required from the members of the union towards the expenses of the union, and in that case the rules shall provide that the relief shall be given as far as possible to all members who are exempt on the occasion of the same periodical payment and for enabling each member of the union to know as respects any such periodical contribution, what portion, if any, of the sum payable by him is a contribution to the political fund of the union.

TRADE UNION (AMALGAMATIONS, etc.) ACT 1964
1964 c.24, ss.1(1), (2), 2, 4(1), (2), (3), 9(1).

1. (1) Subject to this section -
(a) two or more trade unions may amalgamate and become one trade union, with or without a division or dissolution of the funds of any one or more of those unions, but shall not do so unless, in the case of each of the amalgamating unions, a resolution which approves an instrument of amalgamation approved by the Registrar has been passed on a vote taken in a manner which satisfies the conditions specified in subsection (2) of this section;

- (b) a trade union may transfer its engagements to any other trade union which undertakes to fulfil those engagements, but shall not do so unless, in the case of the transferor union, a resolution which approves an instrument of transfer approved by the Registrar has been passed on a vote taken in a manner which satisfies the said conditions.
- (2) The conditions referred to in the foregoing subsection are the following, that is -
 - (a) every member of the union must be entitled to vote on the resolution;
 - (b) every member of the union must be allowed to vote without interference or constraint and must, so far as is reasonably possible, be given a fair opportunity of voting;
 - (c) the method of voting must involve the marking of a voting paper by the person voting;
 - (d) all reasonable steps must have been taken by the union to secure that, not less than seven days before voting on the resolution begins, every member of the union is supplied with a notice in writing approved for the purpose by the Registrar.

...

- 2. (1) Section 1 of this Act shall apply in relation to every amalgamation or transfer of engagements notwithstanding anything in the rules of any of the trade unions concerned or in the following provisions of this section.
- (2) For the purposes of the passing of a resolution to approve an instrument of amalgamation or transfer, the committee of management or other governing body of a trade union shall, unless the rules of that union expressly provide that this subsection shall not apply in relation to that union, have power, notwithstanding anything in the rules of the union, to arrange for a vote of the members of that union to be taken in any manner which that body think fit.
- (3) Where, in the case of a trade union, a vote is taken (whether under arrangements made under subsection (2) of this section or under provisions in the rules of the union) on a resolution to approve an instrument of amalgamation or transfer, a simple majority of the votes recorded shall be sufficient to pass the resolution, notwithstanding anything in the rules of the union and, in particular, notwithstanding anything in those rules, which but for this subsection, would require the resolution -
 - (a) to be passed by a majority greater than a simple majority, or
 - (b) to be voted on by not less than a specified proportion of the members of the union:

Provided that the foregoing provisions of this subsection shall not apply in the case of a union whose rules expressly provide that this subsection shall not apply in relation to that union.

4. (1) A member of a trade union which passes or purports to pass a resolution approving an instrument of amalgamation or transfer may complain to the Registrar on one or more of the following grounds, that is -
- (a) that the manner in which the vote on the resolution was taken did not satisfy the conditions specified in section 1(2) of this Act; or
 - (b) where that vote was taken under arrangements made under section 2(2) of this Act, that the manner in which it was taken was not in accordance with the arrangements; or
 - (c) where that vote was taken under provisions in the rules of the union, that the manner in which it was taken was not in accordance with those rules; or
 - (d) that the votes recorded did not have the effect of passing the resolution.
- (2) A complaint under this section may be made at any time before, but shall not be made after, the expiration of a period of six weeks beginning with the date on which an application for registration of the instrument of amalgamation or transfer is sent to the Registrar; and where a complaint is made under this section, the Registrar shall not register the instrument under this Act before the complaint is finally determined.
- (3) Where a complaint is made under this section the Registrar may either dismiss it or, if after giving the complainant and the trade union an opportunity of being heard he finds the complaint to be justified, may either -
- (a) so declare, but make no order under this subsection thereon, or
 - (b) make an order specifying the steps which must be taken before he will entertain any application to register the instrument of amalgamation or transfer, as the case may be.
- ...
9. (1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say...

"the Registrar" means the Chief Registrar of Friendly Societies;

"trade union" means a trade union within the meaning of the Trade Union Act 1913, whether registered or not, other than a Northern Ireland union; ...

APPENDIX F

SELECTED LEGISLATION

AUSTRALIA

Federal Legislation

CONCILIATION AND ARBITRATION ACT 1904-1964 (Aust.).

PART I - INTRODUCTORY

4. (1) In this Act, except where otherwise clearly intended -

"Association" means any trade or other union, or branch of any union, or any association or body composed of or representative of employers or employees, or for furthering or protecting the interests of employers or employees;

"Award" means an award made under this Act and includes an order;

"Commissioner" means a Commissioner appointed under this Act and includes the Senior Commissioner;

"Employer" means any employer in any industry and includes any person who is usually an employer in an industry and also includes a Club;

"Employee" means any employee in any industry and includes any person whose usual occupation is that of employee in any industry;

"Industrial Agreement" means any industrial agreement made pursuant to this Act;

"Industrial dispute" means -

(a) a dispute (including a threatened, impending or probable dispute) as to industrial matters which extends beyond the limits of any one State; and

(b) a situation which is likely to give rise to a dispute as to industrial matters which so extends, ...

"Industrial matters" means all matters pertaining to the relations of employers and employees and without limiting the generality of the foregoing, includes -

(a) all matters or things affecting or relating to work done or to be done;

(b) the privileges, rights and duties of employers and employees;

...

- (g) the hours of employment, sex, age, qualifications and status of employees;
- (h) the mode, terms and conditions of employment;
- (i) the employment of children or young persons, or of any persons or class of persons;
- (j) the preferential employment or the non-employment of any particular person or class of persons or of persons being or not being members of an organization;
- (k) the right to dismiss or to refuse to employ, or the duty to reinstate in employment, a particular person or class of persons;

...

- (n) any question arising between two or more organizations or within an organization as to the rights, status or functions of the members of those organizations or of that organization or otherwise, in relation to the employment of those members;
- (o) any claim that the same wage shall be paid to persons of either sex performing the same work or producing the same return or profit or value to their employer;

...

"Industry" includes -

- (a) any business, trade, manufacture, undertaking, or calling of employers;
- (b) any calling, service, employment, handicraft, or industrial occupation or avocation of employees; and
- (c) a branch of an industry and a group of industries;

"Inquiry" means any inquiry by the Court under Part IX of this Act;

"Irregularity", in relation to an election for an office, includes a breach of the rules of an organization or of a branch of an organization, and any act, omission or other means whereby the full and free recording of votes by all persons entitled to record votes, and by no other persons, or a correct ascertainment or declaration of the results of the voting is, or is attempted to be, prevented or hindered;

"Judge" means a Judge of the Court and includes the Chief Judge;

"Order" means an order made by the Commission under this Act;

"Organization" means any organization registered pursuant to this Act;

"Registrar" means the Industrial Registrar or Deputy Industrial Registrar appointed under this Act;

"The Commission" means the Commonwealth Conciliation and Arbitration Commission established by this Act;

"The Commission in Presidential Session", in relation to a matter, means the Commission constituted by such presidential members of the Commission to the number of at least three as are nominated by the President for the purposes of that matter;

"The Court" means the Commonwealth Industrial Court created by this Act;

"The President" means the President of the Commission and includes an Acting President.

5. (1) An employer shall not dismiss an employee, or injure him in his employment, or alter his position to his prejudice, by reason of the circumstance that the employee -
- (a) is an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization; or
 - (b) is entitled to the benefit of an industrial agreement or an award; or
 - (c) has appeared as a witness, or has given any evidence, in a proceeding under this Act; or
 - (d) being a member of an organization which is seeking better industrial conditions, is dissatisfied with his conditions; or
 - (e) has absented himself from work without leave if -
 - (i) his absence was for the purpose of carrying out his duties or exercising his rights as an officer or delegate of an organization; and
 - (ii) he applied for leave before he absented himself and leave was unreasonably refused or withheld.

Penalty: Fifty pounds.

- (1A.) An employer shall not threaten to dismiss an employee, or to injure him in his employment, or to alter his position to his prejudice -
- (a) by reason of the circumstance that the employee is, or proposes to become, an officer, delegate or member of an organization, or of an association that has applied to be registered as an organization, or that

the employee proposes to appear as a witness or to give evidence in a proceeding under this Act; or

- (b) with the intent to dissuade or prevent the employee from becoming such officer, delegate or member or from so appearing or giving evidence.

Penalty: Fifty pounds.

PART II - THE COMMONWEALTH CONCILIATION AND ARBITRATION COMMISSION

- 6. (1) There shall be a Commonwealth Conciliation and Arbitration Commission, which shall consist of the following members: -
 - (a) a President;
 - (b) not less than two Deputy Presidents;
 - (c) a Senior Commissioner; and
 - (d) not less than five Commissioners.
- (2) A member of the Commission shall be appointed by the Governor-General by commission and shall hold office as provided by this Act.

PART III - POWERS AND FUNCTIONS OF THE COMMISSION

DIVISION 1 - INDUSTRIAL DISPUTES GENERALLY

- 23. (1) The Commission is empowered to prevent or settle industrial disputes, by conciliation or arbitration, in accordance with this Act.
- (2) The Commission shall make all such suggestions and do all such things as appear to it to be right and proper -
 - (a) for effecting a reconciliation between the parties to industrial disputes;
 - (b) for preventing and settling industrial disputes by amicable agreement; and
 - (c) for preventing and settling, by conciliation or arbitration, industrial disputes not prevented or settled by amicable agreement.

- 24. Subject to this Act, the Commission may exercise any of its powers or functions under this Act of its own motion or on the application of a party to an industrial dispute or of an organization or person bound by an award.

45. Where -

- (a) an organization is a party to or concerned in an industrial dispute with which the Commission or some other tribunal acting in pursuance of a law of the Commonwealth is empowered to deal (whether or not proceedings in relation to the dispute are before the Commission or such a tribunal); and
- (b) the Commission constituted by not less than three members nominated by the President (at least one of whom is a presidential member of the Commission) thinks that the views of the members, or of a section or class of the members, of the organization or of a branch of the organization upon a matter ought to be ascertained with a view to assisting the prevention or settlement of the dispute,

the Commission so constituted may order that that matter be submitted to a vote of those members, or of the members of that section or class, taken by secret ballot (with or without provision for absent voting) in accordance with directions given by the Commission.

46. A person shall not -

- (a) obstruct the taking of a ballot under the last preceding section;
- (b) use any form of intimidation to prevent from voting a person entitled to vote at a ballot under the last preceding section; or
- (c) being an officer of an organization, refuse to assist in the taking of a ballot under the last preceding section by providing for the use of the Returning Officer or his assistants such register and lists of members of the organization as the Returning Officer requires.

Penalty: Fifty pounds or imprisonment for six months.

47. (1) The Commission may, by an award, or by an order made on the application of an organization or person bound by an award, direct that preference shall, in relation to such matters, in such manner and subject to such conditions as are specified in the award or order, be given to such organizations or members of organizations as are specified in the award or order.
- (2) Whenever, in the opinion of the Commission, it is necessary, for the prevention or settlement of an industrial dispute, for ensuring that effect will be given to the purposes and objectives of an award, for the maintenance of industrial peace or for the welfare of society to direct that preference shall be given to members of organizations as provided by the last preceding subsection, the Commission shall so direct.

(3) Where -

- (a) the Commission has, under sub-section (1) of this section, directed, by award or order, that preference shall be given to members of an organization which is an association of employees; and
- (b) a person upon application made to the Registrar in the prescribed form and manner, satisfies the Registrar that the person's conscientious beliefs do not allow the person to be a member of such an organization,

the Registrar shall, subject to sub-section (5) of this section, issue to the person a certificate to the effect that, while the certificate, or a renewal of the certificate, is in force, an employer bound by the award or order is not required, by reason of the award or order, to give preference to members of the organization over the person, and the certificate has effect according to its tenor.

- (4) A certificate under the last preceding sub-section remains in force for such period, not exceeding twelve months, as is specified in the certificate, but, subject to the next succeeding sub-section, may be renewed from time to time by the Registrar for such period, not exceeding twelve months, as the Registrar thinks fit.

(5) The Registrar -

- (a) shall not issue a certificate to a person under sub-section (3) of this section in relation to a direction under sub-section (1) of this section unless the person has paid to the Registrar such amount as would, in the opinion of the Registrar, be payable by the person to the organization specified in the direction in respect of entrance fees and subscriptions if the person became a member of the organization on the day which the certificate is to be issued and continued to be such a member for the period during which the certificate is to remain in force; and
- (b) shall not renew the certificate unless the person has paid to the Registrar such amount as would, in the opinion of the Registrar, be payable by the person to the organization in respect of subscriptions if he were a member of the organization immediately before the renewal of the certificate and continued to be such a member for the period during which the renewed certificate is to remain in force.

- (6) The Registrar shall pay amounts received by him under the last preceding sub-section into the Consolidated Revenue Fund.

- (7) In sub-section (3) of this section, "conscientious beliefs" means any conscientious beliefs whether the grounds for the beliefs are or are not of a religious character and whether the beliefs are or are not part of the doctrine of any religion.

62. (1) If it appears to the Commission in Presidential Session, on the application of an organization, a person interested, the Attorney-General or the Registrar -
- (a) that an organization entitled to the benefit of an award has committed a breach or non-observance of this Act, of an award, or of an order of the Court;
 - (b) that a number of members of an organization sufficiently large to form a substantial part of the organization refuse to accept employment either at all or in accordance with existing awards; or
 - (c) that for any other reason an award ought to be suspended or cancelled in whole or in part,
- the Commission may, subject to such conditions as it thinks fit, suspend or cancel, for such period as it thinks fit, all or any of the terms of an award in force so far as the award applies to, or is in favour of, the organization or its members.
- (2) During the period of suspension or cancellation, a person affected, as a present or past member of the organization, by the suspension or cancellation is not entitled to the benefit of any other award in force and every such award shall cease to apply to the employment of those persons.
- (3) The suspension or cancellation may be limited to specified persons or classes of persons, to a specified branch of the organization, or to specified localities.

PART VIII - REGISTERED ORGANIZATIONS

132. (1) Any of the following associations or persons may, on compliance with the prescribed conditions, be registered in the manner prescribed as an organization:
- (a) . . .
 - (b) Any association of not less than one hundred employees in or in connexion with any industry, together with other persons, whether employees in the industry or not, who are officers of the association and have been admitted as members of the association; and
 - (c) Any association of not less than one hundred employees engaged in an industrial pursuit or pursuits, together with other persons, whether employees engaged in an industrial pursuit or pursuits or not, who are officers of the association and have been admitted as members of the association.
- (2) The conditions to be complied with by associations so applying for registration and by organizations shall be as prescribed.
- (3) Upon registration, the association shall become and be an organization.

133. (1) In addition to the conditions referred to in sub-section (2) of the last preceding section, the conditions to be complied with by associations applying for registration as organizations, and, subject to this section, by organizations, include a condition that the rules of the association or organizations relating to an election for an office in the association or organization or in a branch of the association or organization (being an office specified in paragraph (a), (aa) or (b) of the definition of "Office" in section four of this Act) -

(a) shall provide that the election shall be by secret ballot; and

(b) shall make provision for -

- (i) absent voting;
- (ii) the manner in which persons may become candidates for election;
- (iii) the appointment, conduct and duties of returning officers;
- (iv) the conduct of the ballot;
- (v) the appointment, conduct and duties of scrutineers to represent the candidates at the ballot; and
- (vi) the declaration of the result of the ballot;

and a condition that those rules shall be such as will ensure, as far as practicable, that no irregularity can occur in connexion with the election.

(2) Without prejudice to the operation of section one hundred and forty of this Act, the rules of an association applying for registration, or of an organization, relating to any such election may provide for compulsory voting.

(3) . . .

(4) . . .

(5) . . .

(6) A reference in this section to the rules of an organization shall be read as including a reference to the rules of a branch of the organization.

137. The rules of an organization registered under this Act shall not during the currency of an award in the industry concerned prevent or impede any members of such organization from entering into written agreements in accordance with such award.

138. (1) A person who holds office in, or is otherwise an officer of, an organization or branch of an organization, or the agent of an organization or branch of an organization, shall not, during the currency of an award -

- (a) advise, encourage or incite a member of an organization which is bound by the award to refrain from, or prevent or hinder such a member from -
 - (i) entering into a written agreement;
 - (ii) accepting employment; or
 - (iii) offering for work, or working, in accordance with the award or (in the case of an agreement, employment or work that relates to or is work to which the award applies) with an employer who is bound by the award;
- (b) advise, encourage or incite such a member to make default in compliance with the award;
- (c) prevent or hinder such a member from complying with the award;
- (d) advise, encourage or incite such a member to retard, obstruct or limit the progress of work to which the award applies by "go slow" methods; or
- (e) advice, encourage or incite such a member -
 - (i) to perform work to which the award applies in a manner different from that customarily applicable to that work; or
 - (ii) to adopt a practice in relation to that work, where the result would be a limitation or restriction of output or production or a tendency to limit or restrict output or production.
- (2) The last preceding sub-section extends to advice, encouragement, incitement, prevention or hindrance in relation to employment or work with or for a particular employer or of a particular kind.
- (3) In a prosecution for a contravention of this section it is a defence to prove that the reason for the conduct charged -
 - (a) was unrelated to the terms and conditions of employment prescribed by the award; or
 - (b) was related to a failure or proposed failure by an employer to observe the award.
- (4) In this section, "award" includes an award or order prescribing, directly or indirectly, terms and conditions of employment and made by a prescribed tribunal in pursuance of a law of the Commonwealth other than this Act, and also includes provisions in force by virtue of such an award or order.

Penalty: One hundred pounds.

139. (1) A change of the name of an organization or an alteration of its rules in so far as they relate to conditions of eligibility for membership or the description of the industry in connexion with which the organization is registered shall not have effect unless the Registrar consents to the change or alteration upon an application made as prescribed.
- (2) . . .
- (3) . . .
- (4) . . .
140. (1) A rule of an organization -
- (a) shall not be contrary to a provision of this Act, the regulations or an award or otherwise be contrary to law or be such as to cause the rules of the organization to fail to comply with such a provision;
- (b) shall not be such as to prevent or hinder members of the organization from observing the law or the provisions of an award; and
- (c) shall not impose upon applicants for membership, or members, of the organization, conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organizations under this Act, are oppressive, unreasonable or unjust.
- (2) A member of an organization may apply to the Court for an order declaring that the whole or a part of a rule of the organization contravenes the last preceding sub-section.
- (3) Subject to the next succeeding sub-section, the Court has jurisdiction to hear and determine an application under the last preceding sub-section.
- (4) An organization in respect of which an application is made under this section shall be given an opportunity of being heard by the Court.
- (5) . . .
- (6) . . .
141. (1) The Court may, upon complaint by any member of an organization and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

- (2) Any person who fails to comply with such directions shall be guilty of an offence.

Penalty: Fifty pounds.

143. (1) Any organization or person interested, or the Registrar, may apply to the Court for an order directing the cancellation of the registration of an organization on the ground that -
- (a) the organization has been registered erroneously or by mistake;
 - (b) the rules of the organization fail to comply with or are contrary to a provision of this Act, the regulations or an award or are otherwise contrary to law;
 - (c) the rules of the organization, in so far as they provide for a matter in accordance with the prescribed conditions, have not been observed;
 - (d) the rules of the organization have been administered in such a manner that conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organizations under this Act, are oppressive, unreasonable or unjust, have been imposed upon applicants for membership, or members, of the organization;
 - (e) the proper authority of the organization has wilfully neglected to provide for the levying and collection of subscriptions, fees or penalties from members of the organization;
 - (f) the accounts of the organizations have not been duly audited or the accounts of the organization or of the auditor do not disclose the true financial position of the organization.
 - (g) the organization has wilfully neglected to obey an order of the Court; or
 - (h) the conduct of the organization (either in respect of its continued breach or non-observance of an award or its continued failure to ensure that its members comply with and observe an award or in any other respect), or the conduct of a substantial number of the members of the organization (either in respect of their continued breach or non-observance of an award or in any other respect), has prevented or hindered the achievement of an object of this Act.

. . .

144. (1) A person employed in connexion with an industry, or engaged in an industrial pursuit, is, unless he is of general bad character, entitled, subject to payment of any amount properly payable in respect of membership, to be admitted as a member of an organization (being an organization of employees in or in connexion with that industry or of employees engaged in that industrial pursuit) and to remain a member so long as he complies with the rules of the organization.
- (2) The last preceding sub-section has effect notwithstanding the rules of the organization.
- (3) For the purposes of this section -
- (a) a person whose usual occupation is that of employee in an industry or engagement in an industrial pursuit; or
 - (b) a person who is qualified to be an employee in an industry or to engage in an industrial pursuit and desires to become such an employee or so to engage,
- shall be deemed to be employed in that industry or to be engaged in that industrial pursuit.
- (4) Nothing in this section applies to a person as to whom there is reasonable ground for believing that -
- (a) he is a member of an unlawful association within the meaning of sub-section (1) of section thirty A of the Crimes Act 1914-1950;* or
 - (b) he advocates or encourages, or has, within one year immediately before seeking to become a member of the industrial organization, advocated or encouraged any of the matters referred to in that sub-section.

* [Unlawful associations under that subsection are - (a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda, or otherwise, advocates or encourages - (i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage; (ii) the overthrow by force or violence of the established government of the Commonwealth, or of a State, or of any other civilized country or of organised government; or (iii) the destruction or injury of property of the Commonwealth, or of property used in trade or commerce with other countries or among the States, or which is, or purports to be, affiliated with any organisation which advocates or encourages any of the doctrines or practices specified in this paragraph; (b) any body of persons, incorporated or unincorporated which by its constitution or propaganda, or otherwise, advocates or encourages the doing of any act having, or purporting to have, as an object the carrying out of a seditious intention as defined in section 24A of the Crimes Act. Section 24A defines a seditious intention to include a number of objects - thus to bring the Sovereign into hatred or contempt, and to excite disaffection against the Sovereign or the Government.]

- (5) Where a question or dispute arises as to the entitlement under this section of a person to be admitted as, or to remain a member of an organization, that person, a person who is, or desires to become the employer of that person or the organization may apply to the Court for a declaration as to the entitlement of that first-mentioned person under this section.
- (5A) Subject to sub-section (7) of this section, the Court has jurisdiction to hear and determine an application under the last preceding sub-section and may, notwithstanding anything contained in the rules of the organization concerned, make such order to give effect to its determination as it thinks fit.
- (6) The orders which the Court may make under the last preceding sub-section include an order requiring the organization concerned to treat a person to whom sub-section (1) of this section applies as being a member of the organization and, upon the making of such an order, or as otherwise specified in the order, the person specified in the order becomes, by force of this Act, a member of the organization.
- (7) Where an application is made to the Court under this section -
 - (a) if the application is made otherwise than by a person whose entitlement is in question - that person shall be given an opportunity of being heard by the Court; and
 - (b) if the application is made otherwise than by an organization - the organization concerned shall be given an opportunity of being heard by the Court.

145. A member may resign his membership of any organization -

- (a) if he accepts employment in an industry other than that represented by the organization; or
- (b) on giving three months' notice and the payment of all dues to the date of his resignation.

148. All fines, fees, levies or dues payable to an organization by any member thereof under its rules may, in so far as they are owing for any period of membership subsequent to the registration of the organization, be sued for and recovered in the name of the organization in any court of competent jurisdiction constituted by a Police Stipendiary, or special Magistrate, or, in the State of Tasmania, in a Court of Requests, as debts due to the organization.

149. Every dispute between an organization and any of its members shall be decided in the manner directed by the rules of the organization; and the Court on the application of the trustees or other officers authorized to sue on behalf of or in the name of the organization may order the payment by any member of any fine, penalty, or subscription payable in pursuance of the rules

aforesaid, or any contribution to a penalty incurred or money payable by the organization under an award or order; but no such contribution shall exceed the sum of Ten pounds.

150. The Court may, on the application of any organization, made in the manner prescribed, order that any member of an organization shall cease to be a member thereof from a date and for a period to be named in the order.

PART IX - DISPUTED ELECTIONS IN ORGANIZATIONS

159. (1) Where a member of an organization, or a person who, within the preceding period of twelve months, has been a member of an organization, claims that there has been an irregularity in or in connexion with an election for an office in the organization, or in a branch of the organization, he may lodge an application for an inquiry by the Court into the matter.

(2) An application under this section shall -

- (a) be in writing in accordance with the prescribed form;
- (b) be lodged with the Industrial Registrar before the completion of the election or within such time after the completion of the election as is fixed by or under the regulations;
- (c) specify the election in respect of which the application is made and the irregularity which is claimed to have occurred, and state the facts relied on in support of the application; and
- (d) be accompanied by a statutory declaration by the applicant declaring that the facts stated in the application are, to the best of the applicant's knowledge and belief, true.

(3) . . .

160. (1) Where an application under the last preceding section is lodged with the Industrial Registrar, he shall -

- (a) if he is satisfied -
 - (i) that there are reasonable grounds for an inquiry into the question whether there has been an irregularity in or in connexion with the election, which may have affected or may affect the result of the election; and
 - (ii) that the circumstances of the matter justify an inquiry by the Court under this Part;

grant the application and refer the matter to the Court; or

- (b) if he is not so satisfied, refuse the application and inform the applicant accordingly.
- (2) The Industrial Registrar may exercise his powers under the last preceding sub-section upon the basis of the matters stated in the application, but he may nevertheless take into account any relevant information coming to his knowledge.
- (3) At any time after the lodging with the Industrial Registrar of an application for an inquiry in connexion with an election and before the Industrial Registrar has referred the matter to the Court, the Industrial Registrar, by himself or by a person acting on his behalf, may -
 - (a) inspect any ballot papers, envelopes, lists or other documents which have been used in connexion with or are relevant to the election;
 - (b) for the purpose of any such inspection, enter, with such assistance as he considers necessary, any premises used or occupied by the organization or a branch of the organization in which he believes any such ballot papers, envelopes, lists or documents to be;
 - (c) require a person to deliver to him, in accordance with the requirement, any such ballot papers, envelopes, lists or other documents in the possession or under the control of that person;
 - (d) take possession of any such ballot papers, envelopes, lists or other documents; and
 - (e) retain any ballot, papers, envelopes, lists or other documents delivered to him, or of which he has taken possession, for such period as is necessary for the purposes of the application and, if proceedings under this Part have arisen out of the application, until the completion of the proceedings or until such earlier time as the Court orders.
- (4) Before taking any action under the last preceding sub-section, the Industrial Registrar shall, if he is of opinion that having regard to all the circumstances, any person should be given an opportunity of objecting to the proposed action, give such an opportunity to that person.
- (5) A person shall not -
 - (a) refuse or fail to comply with a requirement under this section; or
 - (b) obstruct or hinder the Industrial Registrar or any other person in the exercise of his powers under this section.

Penalty: One hundred pounds or imprisonment for twelve months, or both.

(6) . . .

[Section 163 lists a number of orders which the Court may make during the inquiry while section 165 sets out some of the orders possible following a finding that an irregularity has occurred, e.g., another election under the direction of the Registrar. Under section 168 the Attorney-General may authorize payment by the Commonwealth of part or all of the expenses incurred by a particular person during the inquiry or of part or all of the expenses of an organization involved in compliance with an order of the Court to either complete an election or hold a new one.]

169. Notwithstanding anything contained in the rules of an organization or of a branch of the organization, an organization and every officer of an organization or branch of an organization who is able to do so, shall take such steps as are necessary to ensure that all ballot papers, envelopes, lists and other documents used in connexion with, or relevant to, an election for an office are preserved and kept at the resistered office of the organization (or, if the election is for an office in a branch of the organization, at the registered office of that branch) for a period of one year after the completion of the election.

Penalty: One hundred pounds or imprisonment for twelve months, or both.

PART XI - MISCELLANEOUS

188. (1) If any organization or if the committee or a branch of an organization, or the committee of a branch of an organization, imposes or declares that it imposes, or that it intends to impose, a penalty, forfeiture of disability of any kind upon a member of the organization by reason of the fact that the member has worked, is working or intends to work in accordance with the terms of an award, the organization shall be guilty of an offence.

Penalty: One hundred pounds.

(2) In this section, "award" includes an award or order, prescribing, directly or indirectly, terms and conditions of employment and made by a prescribed tribunal in pursuance of a law of the Commonwealth other than this Act, and also includes provisions in force by virtue of such an award or order.

188A. If a member of an organization requests the secretary, or a person performing in whole or in part the duties of secretary, of the organization or of a branch of the organization, to furnish to the member a copy of the rules of the organization or of the branch of the organization, the secretary or other person to whom the request is made shall, within seven days after that request is made and upon payment or tender by the member of such amount, not exceeding Two shillings, as the secretary or other person may require, furnish to the member a copy of the rules of the organization or branch, as the case

may be, as in force at the time of the request or a copy of those rules as in force at an earlier time together with a copy of each amendment of the rules made since that time and before the time of the request.

Penalty: Ten pounds.

APPENDIX G

SELECTED LEGISLATION

SOUTH AUSTRALIA

INDUSTRIAL CODE, 1920-1956 (S. Aust.) as amended to December 31, 1963.

PART I - REPEAL AND INTERPRETATION

5. (1) In this Act, unless inconsistent with the context or some other meaning is clearly intended -

. . .

"association" means any trade or other union, or branch of any union, or any association, society, or body composed of or representative of employers or employees, or for furthering or protecting the interests of employers or employees;

"award" means an award or order of the court and includes a variation of an award or order;

"court" means the Industrial Court continued under this Act:

"employee" means -

- (a) for the purposes of Part III of this Act any person employed in any industry, whether on wages or piece-work rates, and includes any person whose usual occupation is that of employee in any industry, but does not include any person employed on a salary or any spouse, son or daughter of his or her employer:
- (b) for the purposes of other Parts of this Act any person employed in any industry, whether on salary, wages or piece-work rates, and includes any person whose usual occupation is that of employee in any industry, but does not include any spouse, son or daughter, of his or her employer:

"employer" -

- (a) means any person, firm, company, or corporation employing one or more employees in any industry, whether on behalf of himself or any other person; and
- (b) . . .

"industrial agreement" means an industrial agreement made pursuant to or continued in force by this Act:

. . .

"registered association" means an association registered under Division VI of Part II of this Act, or the registration of which is continued by this Act:

"the court" means the Industrial Court continued by this Part of this Act:

PART II - INDUSTRIAL ARBITRATION

DIVISION VI - REGISTERED ASSOCIATIONS

72. A printed or typewritten copy of the rules for the time being of a registered association shall be delivered by the secretary of the association to any person applying therefor, on payment of a sum not exceeding five shillings.

75. Every dispute between a registered association and any of its members shall be decided in a manner directed by the rules of the association.

76. (1) All fees, levies or dues payable to a registered association by any member thereof in pursuance of the rules of the association may, in so far as the same relate to any period of membership subsequent to the date of registration of the association, be recovered in any court of competent jurisdiction by the trustees or other officers authorized to sue on behalf of or in the name of the association.

. . . .

77. The court may, on the application of any registered association, made in the manner prescribed, order that any member of a registered association shall cease to be a member thereof from a date to be named in the order and either absolutely or for a period named in the order.

78. During the pendency of any proceedings for an offence against this Part of this Act, in which proceedings a registered association is concerned, no resignation or discharge from membership of such association shall have effect.

80. (1)

(2) In the month of July in every year every registered association shall forward to the Registrar a list of the alterations which have taken place during the six months ending on the preceding thirtieth day of June in the persons who are officers (including trustees) of such association.

(2a) Every registered association shall keep an up to date register of the members of such association which the Registrar may inspect at any reasonable time, and every such association shall, whenever requested by the Registrar furnish him within twenty-eight days of such request with a list of the names of all members of such association or of the number of members thereof as the case may be.

- (3) No association of employees shall return as a member thereof any employee whose subscription is twelve months in arrear.

. . .

82. (1) Neither the Registrar, nor any person acting on his behalf, nor any officer of his department, shall, except by direction of the President, divulge to any person, other than an officer of the registered association -
- (a) the name of any member of such association;
 - (b) the number of members of such association; or
 - (c) the financial position of such association.

Penalty: Twenty-five pounds.

- (2) . . .

85. (1) If it appears to the court, on the application of any registered association, or person interested, or of the Registrar -
- (a) that an association has been registered under this Part of this Act erroneously or by mistake; or
 - (b) that the rules of a registered association have been altered so as no longer to comply with the prescribed conditions, or have not bona fide been observed; or
 - (c) that the rules of a registered association or their administration do not or does not provide reasonable facilities for the admission of new members, or impose or imposes unreasonable conditions upon the continuance of membership, or are or is in any way tyrannical or oppressive; or
 - (d) that the proper authorities of a registered association wilfully neglect to levy and collect the subscriptions or levies referred to in section 76; or
 - (e) that the accounts of a registered association have not been audited in pursuance of its rules, or that the accounts of a registered association or of its auditor do not disclose the true financial position of the association; or
 - (f) that a registered association has wilfully neglected to obey any judgment, award, or order of the court; or
 - (g) that the number of the members of a registered association at the time of the application, would not, having regard to section 63, entitle the association to registration; or

- (h) that a majority in number of the members of a registered association has, by ballot taken as prescribed, indicated a desire to have the registration of such association cancelled; or
- (i) that for any other reason the registration of an association ought to be cancelled,

the court shall order the registration of the association to be cancelled, and thereupon it shall cease to be registered under this Part of this Act.

. . .

85A. (1) A Rule of a registered association -

. . .

- (b) shall not be such as to prevent or hinder members of the registered association from observing the law or the provisions of an award; and
 - (c) shall not impose upon applicants for membership, or members, of the registered association, conditions, obligations, or restrictions which, having regard to the objects of this Act and the purposes of the registration of associations under this Act, are oppressive, unreasonable or unjust.
- (2) A member of a registered association may apply to the court for an order declaring that the whole or a part of a rule of the registered association contravenes subsection (1) of this section.

. . .

- 85b. (1) The court may, upon complaint by any member of a registered association and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of a registered association by any person who is under an obligation to perform or observe those rules.
- (2) Any person who fails to comply with such directions shall be guilty of an offence.

Penalty: Fifty pounds.

86. (1) Whenever two or more registered associations connected with the same industry amalgamate so as to form one association, and such association becomes registered under this Part of this Act as one new association, the Registrar shall -
- (a) cancel the registration of the associations so amalgamated; and
 - (b) place upon the certificate of registration of such new association a memorandum of the names of the association whose registration is so cancelled.

All of the members of the associations so amalgamated (except any member who prior to the amalgamation has given notice to the Registrar and to the association of which he is a member that he does not desire to be a member of the one new association) shall as from the day of registration of such one new association be members of such one new association so registered.

. . .

DIVISION IX - GENERAL PROVISIONS RELATING TO AWARDS

122. (1) No employer shall dismiss any employee from his employment or injure him in his employment, by reason merely of the fact that the employee -
- (a) is an officer or member of an association;
 - (b) is not a member of an association; or
 - (c) is entitled to the benefit of an award or order of the court, an industrial agreement, a determination of a board, or an agreement under section 9b of this Act.

Penalty: Fifty pounds.

- (2) In any proceeding for an offence under this section it shall lie upon the employer to show that any employee, proved to have been dismissed or injured in his employment whilst an officer or member of an association, or whilst not such a member, or whilst entitled as aforesaid (according to the nature of the case), was dismissed or injured in his employment for some reason other than that mentioned in this section.

123. (1) No employee shall cease work in the service of an employer by reason merely of the fact that the employer -
- (a) . . .
 - (b) . . .
 - (c) . . .
 - (d) employs or has employed a person who is not or was not a member of an association.

Penalty: Twenty-five pounds.

- (2) . . .

132. Where a penalty is imposed under this Part of this Act on an association, or an association is, under this Part of this Act, ordered to pay any sum, then, if such penalty or sum is not fully paid within one month thereafter, all persons who were members of such association at the time when the

offence was committed or the order was made shall be jointly and severally liable to pay such penalty or sum in the same manner as if the conviction or order had been made against them personally; and all proceedings in pursuance of the conviction or order may be taken against them, or any of them accordingly, save that no person shall be liable under this section for a larger sum than five pounds in respect of any one conviction or order.

APPENDIX H

SELECTED LEGISLATION

NEW ZEALAND

INDUSTRIAL CONCILIATION AND ARBITRATION ACT 1954, (No. 72) (N.Z.) as amended to December 31, 1965.

INTERPRETATION

2. (1) In this Act, unless the context otherwise requires, -

"Award" means an award made by the Court under this Act:

"Court" means the Court of Arbitration constituted under this Act:

"Employer" means a person employing any worker or workers; and had has the extended meaning assigned to it by subsections two and three of this section.

"Financial member", in relation to any union of workers or of employers or in relation to any society of workers, means a member of the union or society who is a financial member within the meaning of the rules of the union or society; or, in any case where the rules do not contain any definition of a financial member, means a member of the union or society who is not in arrear for more than six months in payment of any fee, subscription, fine, or levy payable by him to the union or society:

"Industrial agreement" means an industrial agreement made under this Act:

"Industrial dispute" means any dispute arising between one or more employers or unions or associations of employers and one or more unions or associations of workers in relation to industrial matters:

"Industrial matters" means all matters affecting or relating to work done or to be done by workers, or the privileges, rights, and duties of employers or workers in any industry, not involving questions which are or may be the subject of proceedings for an indictable offence; and includes all matters affecting the privileges, rights, and duties of unions or associations of the officers of any union or association or affecting or relating to the preferential employment, or the non-employment, of any person or class of persons, whether a member or members of a union of workers or not, but not so as to prevent any employer from engaging any person who at the time of engagement is not a member of a union; and also includes all matters which by this or any other Act are declared or deemed to be industrial matters;

but does not include any matter relating to the compulsory membership of a union of workers by a person, as a condition of his employment, before such employment commences".

"Industry" means -

- (a) Any business, trade, manufacture, undertaking, or calling of employers; or
- (b) Any calling, service, employment, handicraft, or occupation of workers, -

and has the extended meaning assigned to it by subsection two of this section:

"Person" includes a corporation sole; and also includes a body of persons, whether incorporated or not:

"Registrar" or "Registrar of Industrial Unions" means the Registrar of Industrial Unions under this Act:

"Union" or "Industrial union" means an industrial union registered under this Act:

"Worker" means any person of any age of either sex employed by any employer to do any work for hire or reward; and has the extended meaning assigned to it by subsections two and three of this section.

- (2) In order to remove any doubt as to the application of the foregoing definitions of the terms "employer", "industry", and "worker", it is hereby declared that for all the purposes of this Act an employer shall be deemed to be engaged in an industry when he employs workers who by reason of being so employed are themselves engaged in that industry, whether he employs them in the course of his trade or business or not.
- (3) . . .

PART II THE COURT OF ARBITRATION

[Part II sets up the Court of Arbitration consisting of a Judge and 2 other members also appointed by the Governor General.]

- 43. (1) In any proceedings other than arbitration proceedings under Part VII of this Act, the Court shall allow to appear or to be represented (either personally or by agent or by barrister or solicitor) all persons who apply to the Court for leave to appear or be represented, being persons who appear to the Court to be justly entitled to be heard, and the Court may order any other person so to appear or be represented.

- (2) The persons appearing or represented, or ordered to appear or be represented, in any proceedings shall be deemed to be parties to the proceedings.

PART III INDUSTRIAL UNIONS AND ASSOCIATIONS

REGISTRATION OF UNIONS

57. The effect of registration shall be to render the union, and all persons who are members thereof at the time of registration, or who after the registration become members thereof, subject to the jurisdiction by this Act given to a Council and the Court respectively, and liable to all the provisions of this Act, and all such persons shall be bound by the rules of the union during the continuance of their membership.

RULES OF UNIONS.

66. The rules of every society that is registered, or is applying for registration, as an industrial union shall specify the purposes for which the society is formed, and shall provide for -

- (a) The election or (if and so far as approved by the Registrar) the appointment of a committee of management, a president, a secretary, and any other necessary officers of the society or of any branch thereof, and delegates to conferences of the society, and the removal of any of them, and the filling of vacancies, so that the election, removal, and filling of vacancies shall be by secret postal ballot of the financial members of the society or branch, or by such other secret ballot or other means as may be approved by the Registrar as being sufficiently democratic, having regard to the form of government of the society and all other relevant considerations:
- (b) The powers and duties of the committee and of the president and secretary and of any other officers:
- (c) The manner of calling general or special meetings of the society and of any branches thereof, the quorum thereat, the powers thereof, and the manner of voting thereat:
- (d) The mode in which industrial agreements and any other instruments shall be made and executed on behalf of the society, and the manner in which the society shall be represented in any proceedings before a Council or the Court:
- (f) The control of the property, the investment of the funds, and an annual or more frequent periodical audit of the accounts in accordance with the provisions of section 78 of this Act:
- (g) The inspection of the books and of the register of members by every person having an interest in the funds:

- (h) A register of members, and the mode in which and the terms on which persons shall become or cease to be members, so that no member shall be required to give more than two weeks' notice of his intention to discontinue his membership and so that the resignation of a member shall not be effective, except by leave of the committee of management, unless and until he has paid all fees, subscriptions, fines, and levies payable by him under the rules, and shall not exempt him from liability in respect of any act or omission while he was a member.
- (i) The purging of the register by striking off the names of members who are in arrear for twelve months in payment of any fee, subscription, fine, or levy payable under the rules, but so that this shall not free any such person from liability for the arrears due:
- (j) . . .
- (k) The effect of registration, as provided by section fifty-seven of this Act:

67. (1) The Registrar may at any time require any union to amend its rules to bring them into conformity with section sixty-six of this Act, and any such amendment may be made by the committee of management of the union.

LEVIES AND SUBSCRIPTIONS

73. (1) No person shall be required to pay an entrance fee or other fee exceeding five shillings on his admission, or as a condition of his admission, as a member of any union of workers, or as a member of a society of workers bound by an agreement under section eight of the Labour Disputes Investigation Act 1913.
- (2) No member of any union of employers or workers, and no member of a society of workers bound by an agreement under section 8 of the Labour Disputes Investigation Act 1913, shall be required to pay any levy unless -
- (a) In the case of a levy to be applied in the furtherance of political objects, or in the case of a levy whose amount would increase the aggregate amount of the levies payable in any one year by a member of a union or society of workers to more than three pounds, the levy is first approved by a resolution passed by a majority of the valid votes cast at a secret ballot of the financial members of the union or society, being either a postal ballot or a ballot conducted in such other manner as may be approved by the Registrar.

- (b) In the case of any other levy, it is first approved by a resolution (notice of the terms of which and of the amount of the levy has been given before the date of the meeting at which the resolution is to be proposed) passed at a general or special meeting of the union or society or, where the form of government of the union or society is such that its highest governing authority is a conference of delegates elected in accordance with the rules of the union or society, at a general or special meeting of the conference.
- (2A) Where any levy is made by any branch of any union of employers or workers or by any branch of any such society of workers as aforesaid, the provisions of subsection (2) of this section shall be construed, so far as they are applicable, as if references to the union or society were references to the branch. For the purposes of this subsection, the term 'branch' means any portion or division of the membership of the union or society in respect of which provision is made in the rules or by resolution of the union or society (or branch in the case of a sub-branch for the local government of that portion or division of the membership by an executive or committee of management: and includes a sub-branch; but does not include a branch or sub-branch that does not have control of any income or expenditure of the union or society.
- (3) It shall not be competent for any union of workers, or for a society of workers bound by an agreement under section eight of the Labour Disputes Investigation Act 1913, to provide in its rules for the payment by its members of subscriptions at a rate exceeding the rate of two shillings a week unless the rules, in so far as they relate to the subscriptions payable by members, have been adopted by a majority of the valid votes cast at a secret ballot of financial members of the union or society, being either a postal ballot or a ballot conducted in such other manner as may be approved by the Registrar.
- (4) Subject to the foregoing provisions of this section, it shall be competent and shall be deemed to have always been competent for a union to provide in its rules for the payment of subscriptions in advance for any period not exceeding one year.
- (5) Every person who compels or attempts to directly or indirectly compel any person to pay any sum in contravention of this section shall be liable to a penalty not exceeding one hundred pounds in the case of a union or society or employer and not exceed five pounds in the case of a worker, recoverable in either case in the same manner as a penalty for a breach of an award; and all the provisions of this Act with respect to the enforcement of an award shall, as far as they are applicable, apply accordingly.
- (6) Any sums paid by a member of any union or society in contravention of this section may be recovered by him or by an Inspector of Awards on his behalf as a debt due to him by the union or society at any time before the expiration of six months after he has ceased to be a member of the union or society.

ACCOUNTS TO BE KEPT BY UNIONS

. . .

78. (5) Every union shall, upon a request in writing in that behalf, furnish any financial member on demand, without charge, with a copy of the latest annual income and expenditure account and balance sheet, together with the auditor's report thereon:

Provided that, if the member making any such request is a member of a branch, the accounts to a copy of which he is entitled under this sub-section, shall be those of the branch of which he is a member and, if specifically requested, those kept by the headquarters of the union at its registered office.

- (19) For the purposes of this section, unless the context otherwise requires, -

"Branch", in relation to any union, means any portion or division of the union's membership in respect of which provision is made in the rules or by resolution of the union (or branch in the case of a sub-branch) for the local government of that portion or division of the membership by an executive or committee of management; and includes a sub-branch; but does not include a branch or sub-branch that does not have control of any income or expenditure of the union:

"Union" means an industrial union or an association registered under this Act; and includes a society bound by an agreement under section 8 of the Labour Disputes Investigation Act 1913; and...also includes a branch.

[The remainder of s.78 sets out the requirements regarding the contents of and the obligation to disclose and audit the accounts of the union.]

PART IV DISPUTED ELECTIONS IN UNIONS

90. (1) Where not less than ten financial members of a union claim that there has been an irregularity in or in connection with an election in respect of an office in the union or of any branch thereof, they may lodge an application for an inquiry by the Court into the matter.

[S.90(2) sets out the requirements that the application to the Registrar must fulfill. Under s.91, if certain conditions are satisfied the Registrar shall grant the application and refer the matter to the Court. S.102 lists the offences in connection with elections and provides for penalties.]

PART V INDUSTRIAL AGREEMENTS

105. Every industrial agreement duly made, executed, and filed shall be binding on the parties thereto, and also on every member of any union or association which is a party thereto: ...

[The remainder of s.105 excludes from the above reproduced part of s.105 certain employees of a Hospital Board.]

PART VII ARBITRATION

PARTIES TO AWARD

153. (1) Every award, by force of this Act, shall, in addition to the parties thereto, bind every worker who is at any time while it is in force employed by any employer on whom the award is binding.
- (2) If any such worker commits any breach of the award he shall be liable to the same penalty as if he were a party to the award.

AMENDMENT OF AWARD

162. (1) The Court may at any time during the currency of an award —
- (c) Amend the award in accordance with and for the purpose of giving effect to the provisions of Part IX of this Act relating to preference of employment to members of unions....

PART IX GENERAL PROVISIONS AS TO AWARDS AND INDUSTRIAL AGREEMENTS

PREFERENCE OF EMPLOYMENT TO MEMBERS OF UNIONS

174. In this Part of this Act, unless the context otherwise requires, —
- "Adult person" means any person of the age of eighteen years or upwards, and any person who for the time being is in receipt of not less than the minimum rate of wages prescribed for adult workers by any award or industrial agreement; and 'adult worker' has a corresponding meaning:

"Authorised representative", in relation to any union, means any person authorised in accordance with the rules of the union, or by its committee of management, to act on its behalf:

"Qualified preference provision" means —

- (a) In the case of a provision deemed by this Part of this Act to be included in any award or industrial agreement, a provision to the effect that if any employer bound by the award or agreement engages

or employs, in any position or employment which is subject to the award or agreement, any adult person (other than a person who holds a current certificate of exemption from union membership issued under this Act) who is not a member of a union of workers bound by the award or agreement and who fails to become a member of such a union within fourteen days after his engagement, or, as the case may require, after the provision comes into force, or who fails to remain a member of the union so long as he continues in the position or employment, the employer shall cease to employ that person when requested to do so by any officer or authorised representative of the union, provided that -

- (i) Such person has, at any time since his engagement, been requested to become a member of the union by any officer or authorised representative of the union; and
 - (ii) There is a member of the union equally qualified to perform the particular work required to be done and ready and willing to undertake it:
- (b) In the case of a provision inserted by the Court in any award or industrial agreement, a provision to such effect as aforesaid, or such other provision to the like general effect as the Court thinks just, not being a provision amounting to anything in the nature of an unqualified preference provision:

"Unqualified preference provision", in relation to any award or industrial agreement, means a provision to the effect that if any adult person (other than a person who holds a current certificate of exemption from union membership issued under this Act) who is not a member of a union of workers bound by the award or agreement is engaged or employed by any employer bound by the award or agreement, in any position or employment which is subject to the award or agreement, the person shall become a member of such a union within fourteen days (or such shorter period as may be specified in the award or agreement) after his engagement or, as the case may require, after the provision comes into force, and shall remain a member of the union so long as he continues in the position or employment.

174A. . . .

174B. In making any award the Court shall insert therein an unqualified preference provision only if it is satisfied that -

- (a) Such a provision has been agreed to by all the assessors in the course of an inquiry into an industrial dispute by a Council of Conciliation; or

- (b) Not less than fifty per cent of the adult workers who, on the making of the award, will be bound by its desire to become or remain members of a union of workers that is a party to the award.

174C. (1) On any application made in accordance with section 162 of this Act, the Court shall amend an award by inserting therein an unqualified preference provision only if it is satisfied that -

- (a) Such a provision has been agreed to by all the original parties to the award; or
- (b) In any case where the original parties to the award include any association or union of workers on the one hand and any association or union of employers on the other, such a provision has been agreed to by all those associations and unions; or
- (c) Not less than fifty per cent of the adult workers who, on the making of the amendment will be bound by its desire to become or remain members of a union of workers that is a party to the award.

(2) Where any application under subsection (1) of this section is supported by documentary evidence, satisfactory to the Court, that -

- (a) All the original parties to the award concur in the terms of the amendment applied for; or
- (b) In any case where the original parties to the award include any association or union of workers on the one hand and any association or union of employers on the other, all those associations and unions concur in the terms of the amendment applied for -

the Court may in its discretion make the amendment without hearing the parties.

[174E. sets out the requirements as to ballots taken on union membership under para. (b) of s.174B or para. (c) of subsection 1 of s. 174C.]

174 F. (1) If on any proceedings under section 174B or section 174C...of this Act the Court does not insert an unqualified preference provision in the award or industrial agreement, the Court shall, unless it sees good reason to the contrary, insert therein a qualified preference provision.

174G. (1) Where pursuant to this Act an unqualified preference provision is inserted in any award or industrial agreement, the following provisions shall apply:

- (a) Every worker to whom the unqualified preference provision applies shall be deemed to have committed a breach of the award or agreement if he

fails to become a member of a union, in accordance with that provision, after having been requested to do so by any officer or authorised representative of the union, or if, having become a member of the union, he fails to remain a member in accordance with that provision:

- (b) Every employer who is bound by the award or agreement shall be deemed to have committed a breach of the award or agreement if he continues to employ any worker, being a worker to whom that provision applies, after having been notified by any officer or authorised representative of the union that the worker has been so requested to become a member of the union and has failed to become a member in accordance with that provision, or that the worker, after having become a member of the union, has failed to remain a member in accordance with that provision.

174H. Every person who, by virtue of his employment or intended employment, is within the class of which an industrial union of workers is constituted and who is not of general bad character, shall be entitled to be admitted to membership of the union; and so far as the rules of any union are inconsistent with the provisions of this subsection they shall be null and void:

Provided that nothing in this subsection shall apply so as to oblige any union to admit any person to its membership while its maximum membership is fixed by or in accordance with any Act or award or order of the Court if by the admission of that person the prescribed maximum membership of the union would be exceeded.

- 175.
- (1) Any person who objects on the grounds of conscientious belief to being a member of an industrial union may apply to the Registrar of Industrial Unions for a certificate of exemption from membership of any union covering the calling in which the applicant is for the time being employed. In this subsection, the expression 'conscientious belief' means any conscientious belief, whether or not the grounds of the belief are of a religious character, and whether or not the belief is or is not part of the doctrine of any religion.
 - (2) The Registrar shall refer every such application to the Conscientious Objection Committee appointed under the Military Training Act 1949.
 - (3) The Conscientious Objection Committee shall fix a time and place for the hearing of every such application, and shall give notice of the time and place to the applicant and to the secretary of the union to which the application relates, and shall afford the secretary, or some other person appointed in that behalf by the union, an opportunity of being heard on the hearing of the application.

- (4) If, after hearing any such application, the Conscientious Objection Committee is satisfied that the applicant's conscientious objections are genuine, the Committee shall notify the Registrar and the secretary of the union accordingly, and, on payment by the applicant to the credit of the Social Security Fund of an amount equal to the subscription fixed by the union, the Registrar or any duly authorised of the Public Service acting on his behalf shall issue to the applicant a certificate of exemption from membership of the union for the period specified in the certificate, and may from time to time, if he thinks fit, renew the certificate or issue further certificates for subsequent periods without further reference to the Committee.
- (5) A certificate of exemption issued to any person under this section shall, while it continues in force, permit the employment or the continuation of the employment of that person in any position or employment as if he were a member of the union to which the certificate relates.

PART X STRIKES AND LOCKOUTS

191. (1) The following shall be deemed to be a rule of every union of workers, whether registered before or after the commencement of this Act, namely:

"If the members of the union or of any section thereof are concerned in any dispute and there is a proposal that there shall be a strike, no such strike shall take place until the question whether the strike shall take place has been submitted to a secret ballot of those members of the union who would become parties to the strike if the proposal were carried out. The secret ballot shall be held in the manner prescribed by regulations made under the Industrial Conciliation and Arbitration Act 1954, or, if there are no such regulations, then either in the manner prescribed by the rules of the union or, where there are no such rules, in such manner as shall ensure the secrecy of the ballot."

[The remainder of section 191 contains provisions permitting the Registrar to conduct a secret ballot in the manner prescribed in subsection (1) where a strike has taken place without there first having been compliance with that subsection and, also, it provides for penalties for failure of persons to cooperate with the Registrar in his taking of the vote.]

PART XI ENFORCEMENT OF AWARDS AND INDUSTRIAL AGREEMENTS

RECOVERY OF WAGES, etc.

211. (1) Without affecting any other remedies for the recovery of wages or other money payable by an employer to any worker whose position or employment is subject to an award or industrial agreement, it is hereby declared that where any payment of any such

money has been made at a rate lower than that fixed by the award or agreement or otherwise legally payable to the worker, the balance of the money may be recovered to the use of the worker in the same manner as a penalty for a breach of the award or agreement, by action commenced in a Magistrate's Court under section two hundred of this Act or in the Court of Arbitration under section two hundred and six of this Act, notwithstanding the acceptance by the worker of the payment at the lower rate or any express or implied agreement to the contrary:

Provided that notwithstanding the provisions of section two hundred and ten of this Act, any proceedings under this section may be commenced within two years after the day on which the money became due and payable.

- (2) A claim under this section against any employer may be joined in the same action with a claim against the same employer for a penalty for a breach of the award or agreement.

213. (1) When any payment of wages or other money payable by an employer to a worker whose position or employment is subject to an award or industrial agreement has been made at a rate lower than that fixed by the award or industrial agreement, no action shall be brought by the worker against his employer to recover the difference between the money so actually paid and the money legally payable, save within two years after the day on which the money claimed in the action became due and payable.

THE TRADE UNIONS ACT 1908 (No.196) (N.Z.).

2. In this Act, if not inconsistent with the context, -
"Secretary" and "treasurer" respectively include any officer of a trade union acting in the capacity of such secretary or treasurer, or any other person so acting, whether an officer of the union or not:

"Trade Union" means any combination, whether temporary or permanent, for regulating the relations between workers and employers, or between workers and workers, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if this Act had not come into operation, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade:

Provided that this Act shall not affect -

(a) . . .

(b) Any agreement between an employer and those employed by him as to such employment.

(c) . . .

5. Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:

- (a) Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ or be employed:
- (b) Any agreement for the payment by any person of any subscription or fine to a trade union:
- (c) Any agreement for the application of the funds of a trade union -
 - (i) To provide benefits to members; or
 - (ii) To furnish contributions to any employer or worker not a member of such trade union, in consideration of such employer or worker acting in conformity with the rules or resolutions of such trade union; or
 - (iii) To discharge any fine imposed on any person by sentence of a Court of justice:
- (d) Any agreement made between one trade union and another:
- (e) Any bond to secure the performance of any of the above-mentioned agreements:

But nothing in this section shall be deemed to constitute any of the above-mentioned agreements unlawful.

14. (1) Every treasurer of a trade union registered under this Act, at such times as by the rules of such trade union he should render such account as hereinafter mentioned, or on being required so to do, shall render to the trustees of the trade union, or to the members of such trade union at a meeting of the trade union, a just and true account of all moneys received and paid by him since he last rendered the like account, and of the balance then remaining in his hands, and of all bonds or securities of such trade union; which account the said trustees shall cause to be audited by some fit and proper person or persons to be appointed by them.
- (2) . . .
- (3) . . .

21. A person under the age of twenty-one but above the age of fourteen years may be a member of a trade union, unless provision is made in the rules thereof to the contrary; and may, subject to the rules of the trade union, enjoy all the rights of a member except as herein provided, and execute all instruments and give all acquittances necessary to be executed or given under the rules; but shall not be a member of the committee of management, trustee, or treasurer of the trade union.

28. (1) A general statement of the receipts, funds, effects, and expenditure of every trade union registered under this Act shall be transmitted to the Registrar before the first day of June in every year, and shall show fully the assets and liabilities at that date, and the receipts and expenditure of the trade union during the year preceding the date, to which it is made out.
- (2) Such statement shall show separately the expenditure in respect of the several objects of the trade union, and shall be prepared and made out up to such date, in such form, and shall comprise such particulars as the Registrar from time to time requires.
- (3) Every member of and depositor in any such trade union shall be entitled to receive, on application to the treasurer or secretary of that trade union, a copy of such general statement, without making any payment for the same.
- (4) . . .
- (5) Every trade union which fails to comply with or acts in contravention of this section, and also every officer of the trade union so failing, is each liable to a fine not exceeding five pounds for each offence.

APPENDIX I

Canadian Bar Association

Labour Relations Section

Panel Discussion

Thursday, September 2, 1965

Confederation Room

10:00 a.m.

"Does the law provide adequate protection to a trade union member who is unjustly dealt with by the officers or executive of his union or to a person who is refused admission in a union? If not, what additional safeguards or remedies are desirable?"

Chairman: G. A. McAllister,
of the Faculty of Law,
University of New Brunswick,
Fredericton.

Members: R. G. Herbert, D.F.C.,
of the Faculty of Law,
University of British Columbia,
Vancouver.

S. E. Dinsdale, Q.C.,
of Mathews, Dinsdale and Clark,
Toronto.

E. B. Jolliffe, Q.C.,
of Jolliffe, Lewis & Osler,
Toronto.

J. G. Petrie,
of the J. C. McNair firm,
Fredericton.

Background Notes

Expulsion and Admission

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Expulsion and Admission

I

Union Membership

1. Number and Per cent of Labour Force 1964

At the beginning of 1964, membership of labour organizations active in Canada totalled approximately 1,493,000. This amounted to 29.4 per cent of the estimated total number of non-agricultural paid workers in Canada.

2. Union Membership by Congress Affiliation 1964

Congress Affiliation	Number of Locals	Membership	
		Number	Per cent
Canadian Labour Congress	5,818	1,106,020	74.1
AFL-CIO/CLC	4,110	908,948	60.9
CLC only	1,708	197,072	13.2
Confederation of National Trade Unions	623	121,540	8.1
American Federation of Labour and CIO	46	31,282	2.1
Unaffiliated International Unions	412	109,144	7.3
Unaffiliated National Unions	379	85,584	5.7
Independant local organizations	124	39,603	2.7
Total	7,402	1,493,173	100.0

Source: Labour Organizations In Canada, 1964.
Department of Labour, Ottawa.

* Note: Prepared by G. A. McAllister of the Faculty of Law, University of New Brunswick, and J. Gordon Petrie, of the Bar of New Brunswick.

3. Membership by Type of Union and Affiliation, 1964

Type and Affiliation	Number	Number	Membership	
	of Unions	of Locals	Number	Per cent
International Unions	111	4,613	1,062,054	71.1
AFL-CIO/CLC	88	4,410	908,948	60.9
CLC only	3	45	12,680	0.8
AFL-CIO only	9	46	31,282	2.1
Unaffiliated railway brotherhoods	2	123	9,224	0.6
Other unaffiliated unions	9	289	99,920	6.7
National Unions	52	2,441	365,536	24.5
CLC	17	1,489	164,156	11.0
CNTU	13	573	115,796	7.8
Unaffiliated unions	22	379	85,584	5.7
Directly chartered local unions	224	224	25,980	1.7
CLC	174	174	20,236	1.3
CNTU	50	50	5,744	0.4
Independent local organizations	124	124	39,603	2.7
Total	511	7,402	1,493,173	100.0

Source: Labour Organizations In Canada, 1964
Department of Labour, Ottawa.

4. International and National Unions By Size, 1964

Membership Range	International Unions		National Unions		Total	
	Number of Unions	Membership	Number of Unions	Membership	No. of Unions	Membership
Under 500	24	3,651	7	1,504	31	5,155
500-999	6	4,319	6	4,310	12	8,629
1,000-2,499	13	19,718	11	17,343	24	37,061
2,500-4,999	14	48,145	7	26,291	21	74,436
5,000-9,999	20	153,734	11	75,391	31	228,125
10,000-14,999	10	123,484	4	45,674	14	169,158
15,000-19,999	12	211,355	3	52,152	15	263,507
20,000-29,999	4	86,068	1	21,000	5	107,068
30,000 and over	8	412,580	2	121,871	10	534,451
Total	111	1,062,054	52	365,536	163	1,427,590

Source: Labour Organizations In Canada, 1964
Department of Labour, Ottawa.

5. Principal International and National Unions by Relative Size and Position, 1964

Relative Position	Union	Membership
1	United Steel Workers of America (AFL-CIO/CLC)	102,000
2	Canadian Union of Public Employees (CLC)	86,100
3	International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (AFL-CIO/CLC)	63,600
4	United Brotherhood of Carpenters and Joiners of America (AFL-CIO/CLC)	57,100
5	International Association of Machinists (AFL-CIO/CLC)	39,800
6	International Woodworkers of America (AFL-CIO/CLC)	39,200
7	International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Ind.)	38,200
8	International Brotherhood of Electrical Workers	36,600
9	International Brotherhood of Pulp, Sulphite and Paper Mill Workers (AFL-CIO/CLC)	36,100
10	Canadian Brotherhood of Railway, Transport and General Workers (CLC)	35,800

Source: Labour Organizations In Canada, 1964
Department of Labour, Ottawa.

6. Distribution of Union Membership by Industry, 1963

Industry	Membership	Per cent
Forestry	39,800	2.7
Fishing and Trapping	4,300	0.3
Mines	51,000	3.5
Manufacturing	589,500	40.6
Construction	147,200	10.2
Transportation	324,200	22.4
Trade	43,600	3.0
Finance	800	0.1
Service	104,600	7.2
Public Administration	84,600	5.8
Industry Not Reported	5,200	0.4
No return	54,400	3.8
Total	1,449,200	100.0

Source: Based on Industrial and Geographic Distribution of Union Membership in Canada, 1963: The Labour Gazette 1964, pp. 8-13.

7. Distribution of Union Membership by Province, 1963

Province	Membership	Per cent
Newfoundland	20,300	1.4
Prince Edward Island	1,600	0.1
Nova Scotia	41,100	2.8
New Brunswick	27,400	1.8
Quebec	360,200	24.9
Ontario	553,000	38.2

Province	Membership	Per cent
Manitoba	62,400	4.3
Saskatchewan	43,400	3.0
Alberta	63,000	4.3
British Columbia	188,600	13.0
Yukon	600	0.04
Two or more Provinces	33,200	2.3
No return	54,400	3.8
Total	1,449,200	100.0

Source: Based on Industrial and Geographic Distribution of Union Membership in Canada, 1963: The Labour Gazette 1964, pp. 8-13.

II

Record of Court Litigation

1. Distribution by Unions and Complaint

Union	<u>Number of Cases</u>		Citation
	Expulsion	Admission	
Amalgamated Building Workers of Canada	1		(1944) 60 B.C.R. 246 (B.C.)
Association de Taxis La Salle	1		[1950] Que. K.B. 622
Boilermakers' and Iron Shipbuilders Union of Canada	3		[1944] 4 D.L.R. 775 (B.C.) [1946] 1 W.W.R. 78 (B.C.) [1951] 3 D.L.R. 641 (B.C.)
Canadian National Printing Trades Union	1		[1943] 4 D.L.R. 441 (Alta. C.A.)
Cargo and Gangway Watchmen's Union	1		[1953] 1 D.L.R. 327 (N.B. C.A.)
Federated Association of Letter Carriers of Canada	1		(1958) O.W.N. 217 (C.A.)

Union	Number of Cases		Citation
	Expulsion	Admission	
International Association of Bridge, Structural and Ornamental Ironworkers	1		B.C.S.C., (1965) C.C.H. Canadian Labour Law Reporter 14,045
Brotherhood of Railway Car Workers of America	1		(1958) Que. Q.B. 709
International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers' of America, Milk Wagon Drivers and Dairy Employees	1		[1957] S.C.R. 436
International Brotherhood of Electrical Workers	1		(1958) 26 W.W.R. 546 (B.C.)
Journeyman Stone-Cutters' Association of North America	1		(1897) 29 O.R. 151
Order of Railway Conductors	* 1		[1925] 3 D.L.R. 841 (P.C.)
Plumbers and Electricians Union of Quebec	1		(1935) 74 Que. S.C. 286
Seafarers' International Union	5		(1960) 21 D.L.R. 58 (B.C.) (1960) 24 D.L.R. 737 (B.C. C.A.) (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 441 (B.C.) [1961] S.C.R. 682
Steamship Checkers and Cargo Repairers		1	[1954] Que. S.C. 309
Shipyard General Workers Federation of British Columbia		1	[1946] 4 D.L.R. 114 (B.C.)
Trenton Construction Association, Christian Labour Association of Canada		1	(1963) 39 D.L.R. 593 (Ont. H.C.)

* Note: Caven v. C.P.R. Co., [1925] 3 D.L.R. 841 (P.C.), though not an expulsion case, raised similar problems.

Union	Number of Cases		Citation
	Expulsion	Admission	
Union Nationale Catholique des Boulangers	1		(1938) 48 R.L.N.S. 51
United Steelworkers of America		1	[1950] 4 D.L.R. 685 (B.C.)
L'Union des Lambrisseurs de Navires	1		(1948) Que. K.B. 671
Total	22	4	

2. Distribution by Final Court and Complaint

Court	Number of Cases		Citation
	Expulsion	Admission	
Trial Court	12	4	(1935) 74 Que. S.C. 286 (1938) 48 R.L.N.S. 51 [1944] 4 D.L.R. 775 (B.C.) (1944) 60 B.C.R. 246 (B.C.) [1946] 1 W.W.R. 78 (B.C.) (1948) Que. K.B. 671 (1950) Que. K.B. 622 (1958) 26 W.W.R. 546 (B.C.) (1960) 21 D.L.R. 58 (B.C.) (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 593 (Ont.H.C.) B.C.S.C. (1965) C.C.H. Canadian Labour Law Reporter 14,045 [1946] 4 D.L.R. 114 (B.C.) [1950] 4 D.L.R. 685 (B.C.) [1954] S.C. 309 (1963) 39 D.L.R. 593 (Ont.H.C.)
Court of Appeal	6		(1897) 29 O.R. 151 [1943] 4 D.L.R. 441 (Alta.C.A.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1958] O.W.N. 217 (C.A.) (1958) Que. Q.B. 709 (1960) 24 D.L.R. 737 (B.C.C.A.)
Supreme Court of Canada	2		[1957] S.C.R. 436 [1961] S.C.R. 682
Privy Council	2		[1925] 3 D.L.R. 841 [1951] 3 D.L.R. 641

3. Distribution by Province and Complaint

Province	Number of Cases		Citation
	Expulsion	Admission	
Alberta	2		[1925] 3 D.L.R. 841 [1943] 4 D.L.R. 441 (Alta. C.A.)
British Columbia	10	2	[1944] 4 D.L.R. 775 (B.C.) (1944) B.C.R. 246 (B.C.) [1946] 1 W.W.R. 78 (B.C.) [1951] 3 D.L.R. 641 (P.C.) (1958) 26 W.W.R. 546 (B.C.) (1960) 21 D.L.R. 58 (B.C.) (1960) 24 D.L.R. 737 (B.C.C.A.) (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 441 (B.C.) B.C.S.C. (1965) Canadian Labour Law Reporter 14,045 [1946] 4 D.L.R. 114 (B.C.) [1950] 4 D.L.R. 685 (B.C.)
Manitoba	1		[1957] S.C.R. 436
New Brunswick	1		[1953] 1 D.L.R. 327
Newfoundland			
Nova Scotia			
Ontario	2	1	(1897) 29 O.R. 151 [1958] O.W.N. 217 (C.A.) (1963) 39 D.L.R. 593 (Ont. H.C.)
Prince Edward Island			
Quebec	6	1	(1935) 74 Que. S.C. 286 (1938) 48 R.L.N.S. 51 (1948) Que. K.B. 671 (1950) Que. K.B. 622 (1958) Que. Q.B. 709 [1961] S.C.R. 682 (1954) Que. S.C. 309
Saskatchewan			
Total	22	4	

4. Disposition of Claims and Relief Sought

Nature of Claim	Disposition		Citation
	Allowed	Dismissed	
Damages	9	5	<p>(1935) 74 Que. S.C. 286 [1944] 4 D.L.R. 775 (B.C.) [1946] 4 D.L.R. 114 (B.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 441 (B.C.) [1961] S.C.R. 682</p> <p>(1897) 29 O.R. 151 [1925] 3 D.L.R. 841 (P.C.) [1951] 3 D.L.R. 641 (P.C.) (1958) 26 W.W.R. 546 (B.C.) (1960) 21 D.L.R. 58 (B.C.)</p>
Declaration	7	6	<p>[1944] 4 D.L.R. 775 (B.C.) [1946] 1 W.W.R. 78 (B.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 441 (B.C.)</p> <p>[1925] 3 D.L.R. 841 (P.C.) [1946] 4 D.L.R. 114 (B.C.) [1950] 4 D.L.R. 685 (B.C.) [1951] 3 D.L.R. 641 (P.C.) (1958) 26 W.W.R. 546 (B.C.) (1960) 21 D.L.R. 58 (B.C.)</p>
Injunction	3	4	<p>(1944) 60 B.C.R. (B.C.) (1958) O.W.N. 217 (C.A.) B.C.S.C. (1965) Canadian Labour Law Reporter 14,045</p> <p>[1925] 3 D.L.R. 841 (P.C.) [1943] 4 D.L.R. 441 (Alta. C.A.) (1958) 26 W.W.R. 546 (1960) 24 D.L.R. 737 (B.C.C.A.)</p>
Other Relief			(1963) 39 D.L.R. 593 (Ont. H.C.)
Mandamus	5	1	<p>(1935) 74 Que. S.C. 286 (1948) Que. K.B. 671 (1950) Que. K.B. 622 (1958) Que. Q.B. 709 [1961] S.C.R. 682</p> <p>[1954] Que. S.C. 309</p>

Nature of Claim	<u>Disposition</u>		Citation
	Allowed	Dismissed	
Not classified			(1938) 48 R.L.N.S. 51

5. Distribution by Party Defendant

Party Defendant	Number of Cases	Citation
Union	6	[1943] 4 D.L.R. 441 (Alta. C.A.) [1953] 1 D.L.R. 327 (N.B.C.A.) (1954) Que. S.C. 309 (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 441 (B.C.) B.C.S.C. (1965) C.C.H. Canadian Labour Law Reporter 14,045
Individuals	5	[1943] 4 D.L.R. 441 (Alta. C.A.) (1944) 60 B.C.R. 246 (B.C.) [1946] 1 W.W.R. 78 (B.C.) See [1953] 1 D.L.R. 327 (N.B.C.A.) (1958) 26 W.W.R. 546 (B.C.)
Representative Action	12	(1897) 29 O.R. 151 [1944] 4 D.L.R. 775 (B.C.) [1946] 4 D.L.R. 114 (B.C.) [1950] 4 D.L.R. 685 (B.C.) [1951] 3 D.L.R. 641 (P.C.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) (1958) 26 W.W.R. 546 (B.C.) (1960) 21 D.L.R. 58 (B.C.) (1960) 24 D.L.R. 737 (B.C.C.A.) (1960) 26 D.L.R. 678 (B.C.) (1961) 31 D.L.R. 45 (B.C.)
Employer	3	[1925] 3 D.L.R. 841 (P.C.) (1960) 21 D.L.R. 58 (B.C.) (1960) 24 D.L.R. 737 (B.C.C.A.)
Not classified	6	(1935) 74 Que. S.C. 286 (1938) 48 R.L.N.S. 51 (1948) Que. K.B. 671 (1950) Que. K.B. 622 (1958) Que. Q.B. 709 [1961] S.C.R. 682

The Table does not include Trenton Construction Workers Association v. Tange (1963) 39 D.L.R. 593 (Ont. H.C.) where an order of the Ontario Labour Relations Board was quashed on certiorari.

6. Elapsed Time: Cause of Expulsion Complaint to Disposition

Period	Number	Citation
under 1 year	8	[1944] 4 D.L.R. 775 (B.C.) (1944) 60 B.C.R. 246 (B.C.) [1946] 1 W.W.R. 78 (B.C.) [1950] 4 D.L.R. 685 (B.C.) (1960) 21 D.L.R. 58 (B.C.) (1960) 24 D.L.R. 737 (B.C.C.A.) (1961) 31 D.L.R. 441 (B.C.) B.C.S.C. (1965) Canadian Labour Law Reporter 14,045
1 to 2 years	4	(1897) 29 O.R. 598 (C.A.) [1943] 4 D.L.R. 441 (Alta. C.A.) [1946] 4 D.L.R. 114 (B.C.) (1960) 26 D.L.R. 678 (B.C.)
2 to 3 years	3	[1925] 3 D.L.R. 841 (P.C.) [1953] 1 D.L.R. 327 (N.B.C.A.) [1958] O.W.N. 217 (C.A.)
3 to 4 years	2	(1958) 26 W.W.R. 546 (B.C.) [1961] S.C.R. 682
6 to 7 years	1	[1951] 3 D.L.R. 641 (P.C.)
9 to 10 years	2	[1957] S.C.R. 436 (1958) Que. Q.B. 709
Not classified	5	(1935) 74 Que. S.C. 286 (1938) 48 R.L.N.S. 51 (1948) Que. K.B. 671 (1950) Que. K.B. 622 [1954] Que. S.C. 309

III

The Bases of Judicial Intervention

1. The Traditional Policy

"Anglo-American Courts have pursued a traditional policy of non-intervention in the internal disputes of voluntary associations. It is universally accepted that this reluctance is, as it has been

expressed 'a product of a long judicial experience in attempting to settle family fights' (Summers, Legal Limitations on Union Discipline (1950), 64 Harvard Law Rev. 1049, at p. 1051). That the courts continued this hands-off policy when first presented with internal disputes in trade unions is not surprising, for at that time the judiciary had apparently not fully appreciated the vital distinction both in constitution and in function between a voluntary association, such as a fraternal club and a trade union. In fact...judicial acknowledgment of any distinction is rarely found even now": Stone, Wrongful Expulsion From Trade Unions (1956), 34 Can. Bar Rev. 1111, at pp. 1111-1112.

2. Expulsion: Property Theory

(a) Juridical Basis. In Rigby v. Connal (1880) L.R. 14 Ch. D. 482, at p. 487, Jessel M.R. said in a dictum:

"I have no doubt whatever that the foundation of the jurisdiction is the right of property vested in the members of the society and of which he is unjustly deprived by such wrongful expulsion."

(b) Vulnerability. The property theory is widely regarded as vulnerable in its central juridical restrictions to (1) the protection of property rights or interests in the physical assets of the union and (2) intervention only in the presence of an interference with them.

(c) Power of Courts. Denning L.J., in Lee v. Showmen's Guild of Great Britain [1952] 1 All E.R. 1175 (C.A.), denied that there was any such limitation on the power of the courts.

3. Expulsion: The Contract Theory

(a) Juridical Basis. In Orchard v. Tunney, [1957] S.C.R. 436, Rand J. (Cartwright and Abbott JJ. concurring) said:

"Apart...from statute, that a union is held together by contractual bonds seems obvious; each member commits himself to a group on a foundation of specific terms governing individual and collective action... with the intent that the rules shall bind them in their relations to each other"

(b) Acceptance. The contract theory of intervention has received acceptance both in England and in Canada: Lee v. Showmen's Guild of Great Britain, [1952] 1 All E.R. 1175 (C.A.); Abbott v. Sullivan, [1952] 1 All E.R. 226 (C.A.); Bonsor v. Musician's Union, [1955] 3 All E.R. 518 (H.L.); Kuzych v. White, [1951] 3 D.L.R. 641 (P.C.); Orchard v. Tunney, [1957] S.C.R. 436.

(c) Vulnerability. The theory is widely regarded as vulnerable on the particular grounds:

(1) that it is difficult to maintain that a member "consented" to the rules and regulations defining his membership where union membership is obligatory.

"The man is supposed to have contracted to give them these great powers; but in practice he has no choice in the matter. If he is to engage in the trade, he has to submit to the rules promulgated by the committee.... A man's right to work is just as important to him, if not more important than, his rights of property"

per Denning L.J. in Lee v. Showmen's Guild of Great Britain, [1952] 1 All E.R. 1175 (C.A.).

(2) that, in jurisdictions where unions have an unincorporated status, the union as such would not be party to the contract.

"Apart, then, from statute...the contractual rights of a member are...with all members except himself, otherwise it would be the group as one that contracts...not having contractual capacity, it follows, a fortiori, that a union as such cannot incur liability in tort."

per Rand J. in Orchard v. Tunney, [1957] S.C.R. 436.

(d) Inadequacy of Relief.

"At best, the contract theory is but a technique for judicial intervention, and surely it will not survive careful legal analysis. If we are to follow a strict contract theory, legal relief would not be adequate, and in some cases it would be negligible"

Stone, Wrongful Expulsion From Trade Unions (1956), 34 Can. Bar Rev. 1111, at p. 1116.

4. Expulsion: The Tort Theory

- (a) Juridical Basis. In Tunney v. Orchard, [1955] 3 D.L.R. 15 (Man. C.A.) Triteschler J. said:

"With the growth of associations, particularly labour unions, in which the members had no property rights, the law did not hesitate to meet the changing conditions. It found a remedy in the theory of contract. The property theory was too narrow and rigid but the law proved flexible. It has now been demonstrated that the contract theory has become too rigid.

"If the law is too rigid who makes it so? Who can keep it flexible? The judges found it possible to move from property to contract to meet the exigencies of the times. The step from contract to status is not more revolutionary.... In my opinion the destruction of plaintiff's union status was a tort."

- (b) Acceptance. Support for a status theory of intervention is widely enunciated in legal literature (see the references collated by Carrothers, Case and Comment (1956), 34 Can. Bar Rev. 70, at p. 80) and, in an exposition of the base, Denning L.J. (dissenting) in Abbott v. Sullivan, [1952] 1 All E.R. 226 (C.A.), cited with approval McMillan v. Free Church of Scotland (1861), 23 Dunl. (Ct. of Sess.) 1314, in which Lord Inglis said:

"The possession of a particular status, meaning by that term the capacity to perform certain functions, or to hold, certain offices, is a thing which the law will recognize as a patrimonial interest, and no one can be deprived of its possession by the unauthorized or illegal act of another without having a legal remedy."

- (c) Basis of Rejection. In rejecting status, as an acceptable common law basis for intervention, in Orchard v. Tunney, [1957] S.C.R.

436, Rand J. (Cartwright and Abbott JJ. concurring) adverted to the unwarranted act of legislative policy that would be required in the face of the existing juridical conception of status:

"Status in its strict sense appears a condition of one or more persons between or toward whom and another or others distinctive legal relations exist.... Generally,...status embodies personal elements and is recognized by foreign states, although, in them, its incidents may or may not be accorded enforcement....

"I cannot bring the relations of a member with his immediate union within such a condition. With or without international affiliations these groups, as yet, are local to their own jurisdictions or other geographical areas and are intended to be so; what special rights or capacities can be predicated of membership which to foreign employment or law, or to our own present law, would be matter for any form of recognition?.... The conclusive answer seems to be that on the assumption that the group is bound by an underlying agreement the incidents are already furnished by the parties themselves. To declare a contractual provision to be an incident of a newly recognized status would be an unnecessary act of legislation; to extend it to an element beyond the contract would be to embark upon legislative policy in an unwarranted manner."

(d) A New Conception.

"One cannot but regret the seeming inability of the common law hitherto to develop a new conception or legal relationship arising out of membership of an association, whether purely unincorporated or not, and to treat deprivation of that relationship as in itself a substantive tort, rather than engaging in the dubious task of trying to force this relationship into the framework of some established category, such as contract or status, which it does not really fit."

Lloyd, Case and Comment (1958), 36 Can. Bar Rev. 83, at p. 89.

5. Expulsion: "The Badge of Right"

In dismissing an appeal against issuance of a mandamus, under the Civil Code of Procedure, to reinstate an expelled member in Seafarers' International Union of North America v. Stern, [1961] S.C.R. 682, Fauteux J. (for the court) said:

"Union mark for members of the working classes is now a requisite to obtain work. This requisite is clearly essential in cases of closed shop and virtually so in nearly all of the other cases. In the words of Mr. Justice Rand in Orchard et al v. Tunney, [1957] S.C.R. 436 at page 446:

'Membership is the badge of admission and continuance and, vis-a-vis the employer, to remove the badge is directly and immediately to defeat the right.'

These are facts that are now given effective recognition in labour and industrial laws where labour relations, labour conditions, collective agreements and industrial peace are, amongst other matters, dealt with. The right here involved is the right which respondent shares with other members of the working classes to maintain himself in a position to obtain work and, for all practical purposes, it is the right to earn his living. And those who exercise a control over union membership hold, towards the working classes, a position which the law effectively raises above the level of a merely private nature.

"Under like conditions, the right claimed by respondent and the duty required to be performed by appellant cannot be of a merely private nature. On these views mandamus can obtain under section 5 of article 992...."

6. Expulsion: Protection of Statutory Rights

In Burwash v. International Association of Bridge, Structural and Ornamental Ironworkers, Local 97, B.C.S.C. (1965) C.C.H. Canadian Labour Law Reporter 14,045, where an interim injunction was granted to restrain expulsion proceedings predicated upon a violation of the union constitution in supporting a rival union in a secret representation vote under the Labour Relations Act, Wilson C.J. said:

"If this democratic vote is to involve the risk of expulsion from the winning union, and hence, in the case of the closed shop condition that exists in relation to the defendant union...deprivation of the right to earn a livelihood in his own trade, then a voter, a worker, by expressing his honest thought may ruin himself for life and expose his family to starvation or subsistence on the welfare rolls...it seems to me that it may be--I do not say must be, for there is still to be a trial--against the purpose and design of this legislation that any union member should be subjected to a trial, the sole purpose of

which is to decide how he voted in a representation vote with the added implication, of course, that mere proof that he voted for another Union is a valid ground for expelling him."

7. Expulsion: "Legitimate" Union Purposes

In Seafarers' International Union of North America v. Stern, [1961] S.C.R. 682, where a member was suspended for violating a boycott order directed against an hotel, Fauteux J. (for the Court), in dismissing an appeal against an order of reinstatement to union privileges, said:

"It is doubtful that a trade union could attribute to itself the power to coerce, by threats of suspension of the right to obtain work, its present or future members--who are virtually forced to maintain Union membership in order to obtain employment,--to boycott third parties in the exercise of their calling, for reasons and in circumstances such as are present in this case. Boycotting may, in certain circumstances, become a form of oppressive combination which the law condemns.... The criminal law has been amended to grant immunity to trade unions from prosecutions for agreements in restraint of trade. This is a qualified immunity which flows from a policy designed to promote legitimate endeavours of the working classes. It does not follow that this special immunity will operate in cases of combinations absolutely foreign to such endeavours and of which the end or the means are unlawful. It is unnecessary...to pursue the matter, the opinion reached as to the first point being decisive...."

8. Admission: "Choice of Associates"

In Graham v. Bricklayers and Masons' Union (1908), 9 W.L.R. 475. (B.C.C.A.), Hunter C.J. said:

"I may remark that there are many harsh acts for which there is no remedy known to the law.... So that the fact that a particular act be harsh, unfeeling or inconsiderate, and may in fact do undoubted injury, does not necessarily give rise to any legal liability or remedy. It was not disputed, and indeed cannot be disputed, that a body of workmen may for the protection of their lawful trade, and the promotion of their interest, associate themselves together, and prescribe conditions for the admission or rejection of others to the association, and if any conditions appear to work hardship by resulting in the rejection of any applicant, there is no

remedy by which the body can be forced to associate themselves with the applicant, and it would indeed be futile to attempt any such thing, as that would be in conflict with the undoubted right of all persons to choose their associates"

9. Admission: Right to Membership

In Kuzych v. White, [1950] 2 W.W.R. 193 (B.C.C.A.), O'Halloran J.A. observed:

"A man has a right to work at his trade. If membership is a condition attached to working at his trade, then he has an indefeasible right to belong to that union. It must be so, or else the union can have no right to agitate for a closed shop."

Sidney Smith J.A. said:

"The learned Judge below has raised an interesting question whether recent labour legislation has not given a union member a statutory right to membership.... If there has been no change, then it seems to me the Legislature should seriously consider whether membership on which men's livelihood depends should be left entirely at the mercy of committees and similar domestic tribunals. Things seemed to have advanced past the stage when principles that originally only governed membership for social committees should be allowed to prevail where men's livelihood is at stake."

IV

Grounds of Expulsion and Non-Admission

1. Alleged Grounds of Expulsion: Incidence and Relief

Grounds	No. of Cases	Relief	Citation
Activity Detrimental to Union Interests	3	dismissed	(1897) 29 O.R. 151
		dismissed	[1951] 3 D.L.R. 641 (P.C.)
		dismissed	(1958) 26 W.W.R. 547 (B.C.)

Grounds	No. of Cases	Relief	Citation
Breach of Constitution	4	declaration dismissed damages declaration injunction	[1946] 1 W.W.R. 78 (B.C.) (1958) Que. Q.B. 709 (1961) 31 D.L.R. 441 (B.C.) B.C.S.C. (1965) C.C.H. Canadian Labour Law Reporter 14,045
Conduct unbecoming Union Member	1	dismissed	[1951] 3 D.L.R. 641 (P.C.)
Criticism of Internal Management	1	declaration; injunction; claim for damages dismissed	[1958] O.W.N. 217 (C.A.)
Criticism of Internal Union Affairs	1	damages declaration	[1957] S.C.R. 436
Criticism of Union Officers	1	declaration	[1953] 1 D.L.R. 327 (N.B.C.A.)
Disclosure of Union Secret	1	damages mandamus	(1935) 74 Que. S.C. 286
Dual Unionism	4	dismissed dismissed damages declaration injunction	[1943] 4 D.L.R. 441 (Alta. C.A.) (1960) 21 D.L.R. 58 (B.C.) (1960) 26 D.L.R. 678 (B.C.) B.C.S.C. (1965) C.C.H. Canadian Labour Law Reporter 14,405
Violation of Internal Directives	1	injunction	(1944) 60 B.C.R. 246 (B.C.)
Violation of Oath of Obligation	1	dismissed	[1951] 3 D.L.R. 641 (P.C.)
Violation of Union Policy	1	mandamus	[1961] S.C.R. 682
Not Classified	5	dismissed damages reinstated injunction dismissed	(1938) 48 R.L.N.S. 51 [1944] 4 D.L.R. 775 (B.C.) (1948) Que. K.B. 671 (1950) Que. K.B. 622 (1962) 24 D.L.R. 737 (B.C.C.A.)

Note: The grounds alleged accord with the judicial descriptions and are not otherwise classified.

2. Alleged Grounds of Non-Admission: Incidence and Relief

Grounds	No. of Cases	Relief	Citation
Non-compliance with pre-requisites other than oath	2	dismissed dismissed	[1950] 4 D.L.R. 685 (1954) Que. S.C. 309
Prior Anti-union Activity	1	dismissed	[1946] 4 D.L.R. 114 (B.C.)
Refusal to take Oath	1	provision not contrary to statute	(1963) 39 D.L.R. 593 (Ont. H.C.)

Note: The grounds alleged accord with the judicial descriptions and are not otherwise classified.

V

Grounds of Judicial Intervention in Expulsion Cases

1. Grounds of Judicial Intervention: Incidence and Relief

Grounds	No. of Cases	Relief Granted	Citation
Bad Faith	3	damages } mandamus } damages } declaration } declaration } injunction }	(1938) 48 R.L.N.S. 51 [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.)
Action Contrary to Natural Justice	5	damages } mandamus } declaration } mandamus } declaration } injunction } damages } declaration }	(1935) 74 Que. S.C. 286 [1946] 1 W.W.R. 78 (B.C.) (1950) Que. K.B. 622 [1958] O.W.N. 217 (C.A.) (1962) 31 D.L.R. 441 (B.C.)

Grounds	No. of Cases	Relief Granted	Citation
Action in Violation of Constitutional Requirement	7	injunction damages declaration injunction declaration damages declaration declaration injunction damages mandamus damages declaration	(1944) 60 B.C.R. 246 (B.C.) [1944] 4 D.L.R. 775 [1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436 [1958] O.W.N. 217 (C.A.) [1961] S.C.R. 682 (1962) 31 D.L.R. 441 (B.C.)
Conspiracy	1	damages declaration injunction	(1961) 26 D.L.R. 678 (B.C.)
Protection of Statutory Right	2	mandamus injunction	(1950) Que. K.B. 622 B.C.S.C. (1963) C.C.H. Canadian Labour Law Reporter 14,405
Unreasonable Appeal Provision	1	damages declaration	(1955) 15 W.W.R. 49 (Man. C.A.)
Not Classified	1		(1948) Que. K.B. 671

Note: The grounds listed accord with the judicial reasons and are not otherwise classified.

VI

Exhaustion of Remedies

1. Domestic Forum

In Essery v. Court Pride of the Dominion (1883), 2 O.R. 596,

Chancellor Boyd said:

"All that is required...is, to see that the party complaining is a member of the society, and the matter in dispute is one relating to the internal economy of the organization, and provided for by its rules and regulations. In such a case the jurisdiction of the Courts is practically ousted until all expedients furnished by the conventional code of laws have been resorted to.

The object...of the constituents in combining to form such societies, is to control their own schemes for mutual benefit, and to ventilate their own difficulties and quarrels by a system of original and appellate tribunals, affording a cheap and speedy mode of trial, with which the Courts never interfere unless the action complained of is contrary to natural justice, or in violation of the rules of the society, or done mala fide, and then only after the party has gone as far as he can go, and done as much as he can do, to obtain what he seeks in the domestic forum: Dawkins v. Antrobus, L.R. 17 Ch. D. 615"

2. Contractual Requirement to Exhaust

In White et al v. Kuzych, [1951] 3 D.L.R. 641, Viscount Simon said:

"Their Lordships are...constrained to hold that the conclusion reached by the general committee was subject to appeal. And they must repudiate both the correctness and the relevance of the view that it would have been useless for the respondent to appeal, because the federation would be sure to decide against him. They see no reason why the federation, if called upon to deal with the appeal, should be assumed to be incapable of giving its honest attention to a complaint of unfairness or of undue severity, and of endeavouring to arrive at the right final decision. At any rate, this is the appeal which the respondent was bound by his contract to pursue before he could issue his writ...."

3. Exclusion of Courts

In Lee v. Showmen's Guild of Great Britain, [1952] 1 All E.R. 1175, Denning L.J. said in a dictum:

"Although the jurisdiction of a domestic tribunal is founded on contract...there are...limitations imposed by public policy.... Another limitation arises out of the well known principle that parties cannot by contract oust the ordinary courts of their jurisdiction."

4. Domestic Codes

In Kuzych v. White, [1950] 4 D.L.R. 187, O'Halloran J.A. said:

"There is a line of reported decisions to the general effect that members...should not be allowed to litigate...

in the Courts, unless they have first exhausted all means of redress within the associations. But this must not be interpreted to enable each association to set up a private law of its own; otherwise there would be a multitude of codes of private law in the land to the exclusion of the common law. The common law is a living thing; it protects individual rights, and does not permit a course of conduct within an association which is male fide or otherwise contrary to what is rightly called natural justice. The common law does not sanction violation of the essentials of justice."

5. Construction

In Bimson v. Federated Association of Letter Carriers of Canada (1957), 10 D.L.R. 11, Thompson J. said:

"...in the absence of evidence indicating otherwise, the language used is to be given its ordinary, natural and primary meaning,... The constitution in question is a strange compilation of contradictions, inconsistencies and vague provisions.... Unlike many union constitutions, there is no catch-all provisions.... I am unable to construe this provision as conferring...the absolute and arbitrary power to suspend or expel.... To confer such drastic powers, involving grave consequences would, in my opinion, demand clear, specific and express language."

6. Internal Appeal Provisions

In Tunney v. Orchard et al (1955), 15 W.W.R. 49, Adamson C.J. said:

"As the plaintiff did not pursue his appeal to the general executive board at Miami in Florida, U.S.A., where his appeal was set to be heard, the defendants submit that this brings the case within the rule laid down in Kuzych v. White (No. 3) (1951) 2 W.W.R. (N.S.) 679, [1951] A.C. 585.... To require a milk-wagon driver with a wife and family, and with earnings of \$40 or \$50 a week, to pursue such an appeal is not reasonable. The conditions which the constitution and the union imposed on the plaintiff to pursue such an appeal left him as helpless as if they had asked him to appear at the South Pole in 1960!... I hold that the provisions for appeal were unreasonable, impracticable and ineffective. I find, too, that the general executive of the union did not make reasonable provision for the hearing and disposition of the appeal. The plaintiff had as a matter of fact no means of redress except by action in the courts."

7. Court Dockets

"The courts' dockets are already so crowded that the road to judicial relief could very well be a long and, in most cases, an expensive one. It is well to make an earnest effort to settle as many of these disputes as possible within the union framework and this would be more likely to result if the court's intervention were permitted only in cases involving unreasonable delay or futility of appeal." Stone, Wrongful Expulsion from Trade Unions (1956), 34 Can. Bar Rev. 1111, at p. 1126.

8. Exhaustion of Remedies: Record of Litigation

<u>Exhaustion</u>	<u>Number of Cases</u>	<u>Citation</u>
<u>Required</u>	3	[1925] 3 D.L.R. 841 (P.C.) [1951] 3 D.L.R. 641 (P.C.) (1959) 21 D.L.R. 58 (B.C.)
<u>Not Required</u>		
(a) appeal provisions unreasonable	2	dictum: [1957] S.C.R. 436 dictum: (1958) 26 W.W.R. 546 (B.C.)
(b) bad faith	2	[1957] S.C.R. 436 [1958] O.W.N. 217
(c) non-compliance with constitutional requirements	2	[1953] 1 D.L.R. 327 (N.B.C.A.) [1957] S.C.R. 436
(d) absence of substantive jurisdiction	3	[1944] 4 D.L.R. 775 (B.C.) (1948) Que. K.B. 671 [1958] O.W.N. 217 (C.A.)
(e) defect of "natural justice"	4	(1935) 74 Que. S.C. 286 [1946] 1 W.W.R. 78 (B.C.) (1950) Que. K.B. 622 [1958] O.W.N. 217 (C.A.)
Not classified	1	(1938) 48 R.L.N.S. 51

Note: The reasons for non-exhaustion accord with the judicial descriptions and are not otherwise classified.

VII

Legislative Policies

A. Canada

1. Protection of Human Rights: FEP Codes

- (a) Prohibited Acts. Subject to exceptions in application, fair employment practices legislation is enacted in Canada and in seven Provinces "to prevent and eliminate practices of discrimination against persons ...in regard to membership in a trade union because of race, national origin, colour or religion".

In general tenor, the legislation provides that "no trade union shall exclude any person from full membership or expel or suspend or otherwise discriminate against any of its members or discriminate against any person in regard to his employment by any employer, because of that person's race, national origin, colour, or religion": Canada, S.C. 1952-53, c. 19, s. 4(3); Manitoba, R.S.M. 1954, c. 81, s. 4(3); New Brunswick, S.N.B. 1956, c. 9, s. 3(2). The prohibited grounds are "race, religion, colour, nationality, ancestry or place of origin" in British Columbia, S.B.C. 1956, c. 16, s. 4(a); "race, religion, religious creed, colour or ethic or national origin" in Nova Scotia, S.N.S. 1963, c. 5, s. 6(3), and Saskatchewan, S.S. 1956, c. 69, s. 5; "race, creed, colour, nationality, ancestry or place of origin" in Ontario, S.O. 1961-62, c. 93, s. 4(2); and "race, colour, sex, religion, national extraction or social origin" in Quebec, S.Q. 1964, c. 67, s. 3.

Subject to exceptions in application, the British Columbia Fair Employment Practices Act provides that "no trade union shall

exclude from membership or expel or suspend any person or member, or discriminate against any person or member, because of age, if the person or member has attained the age of forty-five years and has not attained the age of sixty-five years."

- (b) Administration. The legislation is administered in Canada and in the provinces of legislation, except Ontario and Quebec, by designated directors in the Departments of Labour: a Human Rights Commission is established in Ontario; in Quebec, administration is by the Minimum Wage Commission.
- (c) Complaint Procedure. The complaint procedure in Canada and in the provinces of legislation provides for a complaint by the aggrieved person to the designated authority following which (1) an inquiry or investigation may ensue by the authority or by a designated person to effect a settlement, and (2) if settlement is not effected, a board or commission of inquiry may be established to recommend (except Quebec) "the course that ought to be taken with respect to the complaint".
- (d) Commission Powers. The boards and commissions of inquiry established in Canada and in the provinces of legislation are given specific procedural powers, required to give full opportunity to all parties to present evidence and make representations, and in Canada and in four provinces (British Columbia, Manitoba, New Brunswick and Saskatchewan) the recommendatory powers, subject to variation, "include reinstatement, with or without compensation for loss of employment".
- (e) Curative Orders. The legislation (except in Quebec) provides for ministerial orders to carry into effect the recommendations made by the boards and commissions of inquiry.

- (f) Finality. Orders made are final except in Manitoba where "any person affected by...an order may...within ten days...appeal... to a judge of the Court of Queen's Bench."
- (g) Prosecution. In Canada and in the common law provinces of legislation, penalties are established for violations of the legislation and of orders, and prosecutions may be maintained against a trade union in the union name, subject to the requirement of action being instituted with the consent of the Minister concerned.
- (h) Injunction Proceedings. In Ontario and in Nova Scotia the Minister of Labour, where a trade union has been convicted of a contravention of the legislation, may apply to a judge of the Supreme Court for an order enjoining continuance of the contravention; the order, if made, may be entered and enforced in the same manner as any other order or judgment of the Court.
- (i) Application to Industrial Relations. In the Hamilton Tug Boat case, (Seafarers' International Union of North America, and Hamilton Tug Boat Company Ltd.: (1959) C.C.H. Canadian Labour Law Reporter 16,054), the Canada Labour Relations Board held and expressed the view that the provisions of the Canada Fair Employment Practices Act had no application to proceedings under the Industrial Relations and Disputes Investigation Act:

"There is nothing in the Act which affects the existence or status of an employer or union that has committed a breach of the Act or has been accused of so doing. Under these circumstances the Board cannot imagine that a breach of section 4(3) of the Canada Fair Employment Practices Act by a trade union has the effect of destroying its status as a trade union within

the meaning of the Industrial Relations and Disputes Investigation Act. At the most the union's constitutional rule respecting citizenship might be held to be invalid, but the union itself would not be affected."

Justification for a wider view of the legislation was thus expressed by the Ontario Labour Relations Board in Trenton Construction Workers Association, Local No. 52, Christian Labour Association of Canada and Tange Company Ltd. (1964) C.C.H. Canadian Labour Law Reporter 16,224:

"The Act (Labour Relations) obviously endows a trade union as an exclusive bargaining for all employees in a bargaining unit with the capacity for affecting far-reaching consequences over their economic life. The importance of extending equal rights and opportunities of membership to all employees in a bargaining unit is self-evident. Any arbitrary or discriminatory denial of these rights and opportunities, is not only inimical to basic democratic principles but is incompatible with the union's obligation as an exclusive bargaining agent to represent all employees in the bargaining unit. Any argument that a trade union is purely a private institution to be likened to a golf club or fraternal organization is surely not only belied by the consequences of its existence but is inconsistent with the powers and obligations conferred upon it by the legislation,"

In a number of cases the Ontario Labour Relations Board, in the presence of the Ontario F.E.P. Code and an express prohibition in the Labour Relations Act, cautioned denial or denied bargaining rights in the presence of union constitutional provisions considered in contravention of the F.E.P. Code: Canadian Labour Association of Canada, Hamilton Local and Bosch & Keuning (1954) C.C.H. Canadian Labour Law Reporter 17,086 (caution); Concrete Block & Brick Workers' Association, The Christian Labour Association of Canada and Woodbridge Concrete Products Ltd. (1959) C.C.H. Canadian Labour Law Reporter 16,105 (denied); Trenton Construction Workers Association, Local 52, Christian Labour

Association of Canada and Tange Company Ltd. (1964) C.C.H. Canadian Labour Law Reporter 16,224 (denied). The Board has granted certificates where the alleged restrictive provisions were not unequivocally expressed in the union constitution and not practiced in admission to membership: Sheet Metal Workers' International Association, Local 304 and John Riddell & Son Ltd. (1959) C.C.H. Canadian Labour Law Reporter 16,085; Amalgamated Lithographers of America, Local 12 v. Recording & Statistical Corporation Ltd. (1964) C.C.H. Canadian Labour Law Reporter 16,285.

2. Protection of Human Rights: Labour Codes

- (a) Implied Prohibition. In the absence of express provision, prohibition issued in Murdock Ltd. v. L.R.B. (Quebec), [1956] R.L. 257, where the Quebec Labour Relations Board certified a union excluding Indian woodcutters on ethnic grounds. Boulanger J. said:

"Il n'y a rien dans ces conditions, il ni dans celles da la loi, concernant l'origine ethnique ou raciale, la colour, les coyances, le mode de voir, les coutumes, des salaries. Comme tout autre organisme judiciaires, la Commission doit prendre la loi comme elle est; elle ne peut ni la refaire ni la modifier; elle ne peut changer les definit ions du la loi."

- (b) Express Prohibition. The British Columbia Labour Relations Act expressly provides that no trade union, which discriminates against any person contrary to the Fair Employment Practices Act, shall be certified, and provides that an agreement entered into between such an organization and an employer shall not be deemed a collective agreement: R.S.B.C. 1960, c. 205, s. 12(8). The Ontario Labour Relations Act expressly provides, R.S.O. 1950, c. 94, s. 10 as am. 1960, c. 54:

"The Board shall not certify a trade union...if it discriminates against any person because of his race,

creed, colour, nationality, ancestry or place of origin."

A collective agreement is not to be deemed a collective agreement if it discriminates in the particulars stated.

- (c) Complexity of Provisions. The decision of McRuer, C.J.H.C., in Trenton Construction Workers Association, Local No. 52 and Tange Company Ltd. (1963), 39 D.L.R. 593, quashing the decision of the Ontario Labour Relations Board denying certification, illustrates the complexity of the administrative law problems attracted by an application of the legislation and the ambiguities present with respect to the meanings of the prohibited grounds. In the course of judgment, which turned on discrimination on the ground of "creed", McRuer, C.J.H.C. said:

"It is not to be overlooked that the statutes do not prohibit discrimination but only discrimination on certain grounds. All trade unions discriminate against members who will not subscribe to certain doctrines or beliefs of trade unionism. In the broad sense these could be called creeds but they are not creeds as I construe the meaning of the word "creed" in the statute. As I have emphasized what is prohibited is certification of a trade union 'that discriminates against any person because of his creed'. This is a restrictive clause and must be interpreted accordingly."

3. Representation Fitness

The Prince Edward Island legislation incorporates a representation fitness test before certification:

"Notwithstanding anything contained in this Act, no trade union, the administration, management, or policy of which is, in the opinion of the Board contrary to the public interest..., so that its fitness to represent employees for the purpose of collective bargaining, is impaired, shall be certified"

An agreement entered into between such a trade union and an employer is invalid.

4. Protection of Representation Rights

(a) Implied Protection. The legislation in Canada and in all provinces confers on a certified trade union exclusive bargaining rights for all employees in the appropriate unit. Certification has been denied by the Ontario Labour Relations Board where the union constitution contains restrictions upon the admission to membership of persons whom it seeks to represent as exclusive bargaining agent: London Association of Painting and Decorating Journeymen and Gaymer & Oultram (1954) C.C.H. Canadian Labour Law Reporter 17,073; Ottawa Printing Crafts Union and The Ottawa Citizen (1954) C.C.H. Canadian Labour Law Reporter 17,076; Concrete Block & Brick Workers' Association, The Christian Labour Association of Canada and Woodbridge Concrete Products Ltd. (1959) C.C.H. Canadian Labour Law Reporter 16,105; and see Christian Labour Association of Canada, Hamilton Local and Bosch & Keuning (1954) C.C.H. Canadian Labour Law Reporter 17,086; Trenton Construction Workers Association, Local No. 52, Christian Labour Association of Canada and Tange Company Ltd. (1964) C.C.H. Canadian Labour Law Reporter 16,224.

(b) Basis of Protection. In the Gaymer case, the Ontario Labour Relations Board said:

"If we were to certify the applicant on behalf of all employees in the bargaining unit which we find to be appropriate, we would endow the applicant with power to enter into a collective agreement with the employer requiring as a condition of employment that all employees in the bargaining unit hold membership in the applicant... we might by granting certification to the applicant, condemn the others to discharge from employment, not because of their failure or refusal to join the union but because the applicant by its constitution has created a bar to their admission to membership. We do not believe it was the intention of the Legislature that bargaining

rights should be conferred upon a trade union which disfranchises some of the employees whom it would be required to represent if it were certified as their bargaining agent."

- (c) Restricted Application. The Bosch and Gaymer cases were not followed by the Canada Labour Relations Board where there was no evidence of discrimination under the impugned constitutional provision: Seafarers' International Union of North America, Canadian District and Hamilton Tug Boat Company Ltd. (1959) C.C.H. Canadian Labour Law Reporter 16,054. The cases were distinguished on similar grounds by the Ontario Board in Sheet Metal Workers' International Association, Local 304 and John E. Riddell & Son Ltd. (1959) C.C.H. Canadian Labour Law Reporter 16,085; and see Amalgamated Lithographers of America, Local 17 and Recording & Statistical Corporation Ltd. (1964) C.C.H. Canadian Labour Law Reporter 16,285.

5. Permissive Right to Work Agreements

- (a) Legislative Extent. The legislation in Canada provides that nothing "prohibits the parties to a collective agreement from inserting in the collective agreement a provision requiring, as a condition of employment, membership in a specified trade union, or granting a preference of employment to members of a specified trade union": Canada, R.S.C. 1952, s. 6(1). All provinces, except Prince Edward Island and Quebec, have included this or a similar provision in their legislation. Prince Edward Island provides for preferential hiring; Quebec provides that the agreement may contain any provision respecting conditions of employment not contrary to public order or prohibited by law.

- (b) Legislative Conditions. Certification may issue in Canada as in all provinces except Prince Edward Island on the basis of majority support; in Prince Edward Island, the minimum requirement is that over 50 per cent of the employees in the unit belong to the union and that 60 per cent of those voting in a unit select the applicant union as bargaining agent.

Subject to exceptions, the Ontario Labour Relations Act provides that a union security clause shall not be included in a first agreement unless the trade union establishes that at the time it entered into the agreement not less than 55 per cent of the employees in the unit were members of the trade union.

The Nova Scotia legislation contains a specific exemption for a person who, on a date specified, was an employee of an employer party to an agreement containing a union security clause and who was not a member of the specified trade union party to the agreement.

- (c) Juridical Effect. In Le Syndicate Catholique des Employes de Magasins de Quebec, Inc. v. La Compagnie Paquet Ltee, [1959] S.C.R. 206, Judson J. said:

"The Union is...the representative of all the employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in future conduct his master and servant relations. When this collective agreement was made, it then became the duty of the employer to modify his contracts of employment in accordance with its terms so far as the inclusion of those terms is authorized by the governing statutes."

- (d) Case Collation. Actions to recover for or to prevent dismissal following expulsion under closed shop agreements were dismissed in, among others: Gee v. Freeman (1958), 26 W.W.R. 546 (B.C.); Heard v. Northland Navigation Co. Ltd. (1959), 29 W.W.R. 239 (B.C.); Jurak v. Cunningham (1959), 21 D.L.R. 58 (B.C.); Brady v. Heinekey and Black Ball Ferries (1960), 24 D.L.R. (2d) 737 (B.C.C.A.).

Actions to enforce membership clauses failed in Building and General Labourers' Union, Local No. 602 v. Ocean View Development Ltd., (1955), 5 D.L.R. 12 (B.C.), on the construction of the clause invoked, and in McLaughlin v. Westward Shipping Co. (1960), 21 D.L.R. 770, on the form of the clause and the basis of the remedy sought.

In the McLaughlin case, Brown J. said:

"The union sues for what is in effect a mandatory injunction by asking that the company be forced to take the active step of discharging them:... I hold...that the clause relied on has both a positive and negative aspect, and that an injunction as asked goes beyond a mere enforcement of the implied negative covenant.... I have had the advantage of...the judgment of Wilson J. in Jurak v. Cunningham...and have not overlooked his statement...that the union has a legal right...to demand the discharge of the expelled members. With that I respectfully agree, but point out that I do not consider that it necessarily follows that an injunction will be granted to enforce an unfruitful demand."

- (e) Comment. In Gee v. Freeman, Wilson J. observed:

"The argument is that the legislature, having accepted closed shop agreements, intended to protect workmen by requiring Unions to accept them as members so that no workman would lose or be refused employment because of the existence of a closed shop agreement. But if the legislature intended to legislate thus, I would expect to find different wording clearly imposing on Unions the duty of accepting qualified workmen as members and not merely asserting the right of workmen to belong to an unspecified union. I would like to think that the legislature had attempted in this or any other way to re-establish industrial freedom, the right to work."

6. Dual Unionism

- (a) Protective Sections. The legislation in Canada provides:

"No provision in a collective agreement requiring an employer to discharge an employee because such employee is or continues to be a member of, or engages in activities on behalf of a union other than a specified trade union, is valid."

All provinces except four (Alberta, British Columbia, Quebec, and Saskatchewan) have included this or similar provisions in their legislation.

- (b) Juridical Effect. In Jurak v. Cunningham (1959), 21 D.L.R. 58 (B.C.), where union members were expelled for dual unionism, not under a provision of the collective agreement but under the provisions of the union constitution, Wilson J. dismissing the action, said:

"They have, in effect, been discharged because of their allegiance to another Union and the presumed intention of s. 6, ss. (2) thereby, perhaps, defeated. But statutory restrictions on the right to contract are to be strictly interpreted.... Can I take the acts together as effectively breaking the statutory provision.... I think not: the provisions of the collective agreement do not offend against the statute, and the provisions of the Union constitution are not governed by the statute. The spirit of the law may be frustrated, but the expressed provisions of the law is complied with."

7. Protection of Anti-Union Activity

- (a) Case Collation. The dual unionism provisions referred to in the preceding section extend to union activities on behalf of a union other than a specified union. In a number of cases, the anti-union activity has occurred not on behalf of another union, but against the member union as such: Kuzych v. White, [1951] 2 W.W.R. 679 (P.C.) (public meeting to discuss internal affairs of union);

Orchard v. Tunney, [1957] S.C.R. 436 (insinuation that discrepancies existed in the affairs of the union); Bimson v. Johnson (1958), 12 D.L.R. 379 (Ont.) (dispute over constitutional issues within the union); Gee v. Freeman (1958), 26 W.W.R. 546 (activity in support of a cause, that is, communism, detrimental to the union).

(b) Comment. In the Bimson case, Thompson J. observed:

"While discipline is essential for the maintenance of a union as an effective organization, it may also be an instrument of oppression when misused by over-zealous or misguided leaders. The very nature and purpose of the labour union demands unstinting loyalty from its membership. Important as that consideration may be from the union's point of view, it is just as important as a matter of public concern that individuals in a state and the rights of persons should be protected against undemocratic and tyrannical practices. Fortunately in the ranks of labour organizations there are many sound men who support and rely upon the constitutional right of legitimate individual freedom of speech and action."

(c) The Ontario Provision. The Ontario Labour Relations Act, R.S.O. 1960, c. 202, s. 35(2) expressly provides that no employer shall discharge an "employee" who has been expelled, suspended or denied admission to a trade union, party to an agreement requiring membership as a condition of employment, because he "has engaged in activity against the trade union", subject to the proviso that the benefit of the section is removed where "an employee...has engaged in unlawful activity against the trade union...or an officer, official or agent thereof or whose activity against the trade union...has been instigated or procured by his employer...or whose employer...has participated in such activity or contributed financial or other support to the employee in respect of such activity."

In Walker v. McAnally Freight-Ways, Division of Dominion Freightways Co. Ltd., 64 C.L.L.C. 16,011, where an employee was discharged following expulsion for purportedly false and libelous statements on a union officer, the Ontario Labour Relations Board held that the conduct fell outside the protection of the section and that a restrictive application was required:

"In our opinion, the construction most compatible with the spirit, language and subject matter of the Act as a whole is that section 35(2) is intended to protect an employee from discharge under a union security clause who, in opposition to the trade union, engages in conduct in connection with the lawful assertion or exercise of rights or freedoms conferred by or existing under The Labour Relations Act.... The Legislature, in our opinion, has seen fit to leave all other forms of conduct to be dealt with by the parties according to the principles and limitations of the common or other statutory law.

"...without attempting to define...the precise boundaries of the section...we are not persuaded...that the conduct engaged in by Walker was...within the general boundaries of the section. On the contrary, in our opinions, his conduct was directed to and concerned solely with the criticism of an individual seeking union office and with a matter pertaining to the efficient administration of the domestic or internal affairs of the trade union...even if it could be said that he was exercising a right or freedom conferred by or existing under the Act (e.g. under section 3) Walker's conduct in that respect was not against or in opposition to the trade union."

The Board in the Walker case adverted to the following questions as present in an application of the section: Does it impose an obligation on the employer to determine the cause of an employee's denial of or expulsion from membership? If the employee was engaged in a protected activity, does the section make the employer answerable for loss of wages or employment benefits? Does the section preclude a complaint against the union?

- (d) The Alberta Provisions. The Alberta legislation prohibits a trade union from imposing a pecuniary or other penalty on any person for engaging in employment in accordance with the terms of a collective agreement and (except where a legal strike is in existence) protects an unemployed member in the right to engage in non-unionized employment. It is also provided that an employee may not decline work and that an officer or representative of a union may not authorize, encourage or consent to employees' refusing to perform work for an employer for the reason that other work "will be or has been or will not be or has not been performed by any class of persons being or not being members of a trade union..." In addition to other penalties, a convicting magistrate may, where contravention has occurred, order the officers or representatives of the union to refund the amount of pecuniary penalty levied or to remove any other penalty" (s. 80).

8. Equal Admission Requirements

- (a) Legislative Extent. Legislation in Prince Edward Island, S.P.E.I. 1962, c. 8, s. 7(a), incorporates, as a restriction on permissive preferential hiring, an equal admissions clause:

"...the employer may not discharge or otherwise discriminate against an employee for non-membership, if (a) he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members."

9. Omnibus Non-Admission Provisions

- (a) Legislative Extent. Legislation in Prince Edward Island, S.P.E.I. 1962, c. 18, s. 7(b), incorporates, as a restriction on permissive preferential hiring, an omnibus non-admission clause:

"The employer may not discharge or otherwise discriminate against an employee for non-membership, if (b) he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Legislation in Newfoundland, R.S.N. 1952, c. 258, s. 5A, as am. 1960, c. 58, s. 4, provides that notwithstanding anything in the legislation, an employer may employ a non-union member, otherwise qualified for employment, who has applied for and been refused membership in a union party to a collective agreement; provisions of the union constitution that would exclude such a person are invalid.

10. Dues and Checkoff Provisions

(a) Comment. Rand J. in the Ford Motor Arbitration, 1946, said:

"...the employees as a whole become the beneficiaries of union action, and I doubt if any circumstance provokes more resentment in a plant than this sharing of the fruits of unionist work and courage by the non-member. It is irrelevant to try to measure the benefits in a particular case; the protection of organized labour is premised as a necessary security to the body of employees.... It would not then as a general proposition be inequitable to require of all employees a contribution towards the expense of maintaining the administration of employee interests, of administering the law of their employment.... The obligation to pay dues should tend to induce membership, and this in turn to promote that wider interest and control within the union which is the condition of progressive responsibility."

(b) Legislative Extent and Conditions. Legislation provides for employer compliance with the voluntary checkoff in Alberta, British Columbia, Newfoundland, Quebec and Saskatchewan under the conditions prescribed; in Nova Scotia the checkoff is conditioned on a majority vote of eligible votes in favour of the assignment;

in Prince Edward Island, except where a clause exists in a collective agreement, the checkoff is also conditioned on a vote.. British Columbia and Prince Edward Island prohibit the "political" checkoff. Alberta provides that fees for temporary union cards for each month "shall not exceed an amount equivalent to the dues payable by a member of the union for the same period". (s. 102).

11. Enforcement Provisions: Labour Codes

In general, the enforcement provisions of the labour relations legislation are not specifically directed to expulsion and non-admission situations, and, with exceptions, have not been considered in that context. In the general perspective of enforcement, the techniques used may be noted.

- (a) The legislation in Canada and in all provinces contains express penalty provisions for violations of applicable sections and, subject to consent, prosecutions may be undertaken.
- (b) The legislation in Canada and in three provinces (British Columbia, Manitoba, New Brunswick, Newfoundland) provides for re-instatement and back pay awards as an incident to prosecution against an employer for defined offences; back pay awards may also be made in Alberta in defined circumstances. Under the applicable legislation in Quebec and Saskatchewan re-instatement and back pay may be awarded by the boards in defined circumstances.
- (c) Additional enforcement provisions are expressed in the legislation of Ontario, Nova Scotia and British Columbia.
- (d) The British Columbia and Nova Scotia provisions provide (1) for complaints to the Board that an employer or trade union is or has violated the prohibitions in defined sections, (2) inquiry by a

designated person to effect settlement, (3) if settlement is not effected, inquiry by the Board which may issue a cease and desist order, direct (an employer) re-instatement and back pay, and direct rectification. Orders, if not complied with, are to be filed in the Supreme Court and are enforceable in the same as an order or rule of Court.

- (e) The Ontario provision incorporates similar procedures but would appear to be of wider application and remedy. Specific subsections of section 65 are:

"(1) The Board may authorize a field officer to inquire into a complaint that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment.

"(4) Where a field officer is unable to effect a settlement of the matter complained of, the Board may inquire into the complaint and, if it is satisfied that the person concerned has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment by an employer or other person or a trade union, it shall determine what, if anything, the employer, or other person or trade union shall do or refrain from doing with respect thereto, and such determination may include the hiring or reinstatement in employment of the person concerned, with or without compensation or compensation in lieu of hiring or reinstatement for loss of earnings and other employment benefits, and the employer, other person or trade union shall, notwithstanding the provisions of any collective agreement, do or abstain from doing anything required of them or any of them by the determination."

- (f) The administrative law problems present in an application of section 65 of the Ontario Act are implicit in the Practice Notes issued by the Board. After referring to the procedure under which a field officer, if unable to effect settlement, submits a report to a screening panel of the Board, the Notes continue:

"7. In order to observe the principles set out in section 83(3) [nondisclosure of information] of the Act and the principles of natural justice, the Board has instituted the following procedure:

(a) As soon as the screening panel had made a decision as to whether further inquiry into the complaint should be made, the statements obtained by the field officer are immediately placed in a sealed envelope.

(b) Neither the hearing panel nor the hearing officer, as the case may be, have access to the statements obtained by the field officer.

(c) The only use made of the field officer's report is to enable the screening panel to determine whether further inquiry should be made into the complaint.

(d) No member of the screening panel participates in any hearing which may be conducted thereafter.

(e) The only knowledge of the complaint that the hearing officer, as the case may be, have at the commencement of a hearing is of matters contained in the formal complaint and in the reply to the complaint...filed by the respondent.

(f) The only evidence that the hearing panel of the Board considers is that adduced through witnesses at a public hearing of the complaint.

"8. ...The complainant is therefore required to produce the necessary witnesses at the hearing to prove its case. Failure to do so, will result in the dismissal of the complaint."

B. United States

1. Protection of Human Rights: Civil Rights Act of 1964 and F.E.P. Code

- (a) Prohibited Acts. Generally the state Fair Employment Practice Acts prohibit discrimination in employment on the grounds of "race, creed, colour, national origin or religion". The states wherein racial discrimination is prevalent have not enacted such legislation.

The Civil Rights Act of 1964 regulates the admission policy of labour organizations "engaged in an industry affecting commerce". (s. 701(d)). The legislation establishes the following practices, subject to various exceptions, as prohibited on the part of labour organizations, namely; "to exclude or to expel from its membership or otherwise to discriminate against any individual because of his race, colour, religion, sex, or national origin; to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or, to cause or attempt to cause an employer to discriminate against an individual in violation of this section". (s. 703(d)). Among the exceptions allowed are the following, viz.: religion, sex or national origin as an occupational classification, refusing employment to members of the Communist Party and reasons of national security.

- (b) Administration. The administration of the Civil Rights Act of 1964 is by a commission known as the Equal Employment Opportunity Commission (s. 705(a)); the Attorney General of the United States is granted the standing to institute civil actions where appropriate (s. 707(a)).
- (c) Complaint Procedure. The complaint procedure under the Civil Rights Act of 1964 is initiated by the filing of a formal charge with the Equal Employment Opportunity Commission. The Commission attempts to reach an informal settlement. The federal Act cannot be utilized by an individual if the state wherein the act took place has enacted legislation prohibiting such act.

The Commission notifies the aggrieved party who may institute an action in the applicable Federal District Court (s. 706).

- (d) Commission Powers. The Commission is granted wide investigatory powers with the right to examine both records and witnesses prior to any litigation (ss. 709, 710). Included in the enumerated powers is the following:

"...to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder; upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provision of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title." (s. 705(g)).

- (e) Curative Orders. The Civil Rights Act of 1964 does not provide for administrative settlement except on an informal basis. Section 706(g) empowers the Federal District Court wherein the civil action is commenced to issue injunctions and order reinstatement, require admission and grant back pay. It is specifically stated that no order requiring admission or reinstatement shall issue if the refusal to admit or the expulsion was for any other reason than the discrimination prohibited by the Act.
- (f) Prosecution. The criminal sanction authorized by the Act is intended to cover the situation where there is forcible resistance to the Commission or its representatives (s. 714).

2. Union Security

- (a) National Labor Relations Act. Section 7 of the National Labor Relations Act articulates the American legislative policy

regarding employee freedom:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

The Act outlawed the "closed shop" agreement by making the agreement an unfair labour practice (sections 8(a)(3) and 8(b)(2)). Union interference with rights guaranteed an employee by section 7 is made an unfair labour practice (s. 8(b)(1)). The section reads:

"It shall be an unfair labor practice for a labor organization or its agents to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

- (b) State Right to Work Laws. The National Labor Relations Act gives exclusive jurisdiction to state legislatures to enact what is known as "right to work" laws under the authority of section 14(b) which reads:

"Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law!"

- (c) Railway Labor Act. The Railway Labor Act permits union security to a greater extent than other American legislation:

"Notwithstanding any other provisions of this Act, or of any other statute or law of the United States or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership."

3. Dues and Fees

Section 8(b)(5) of the National Labor Relations Act provides that it is an unfair practice:

"to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected."

4. Membership and Other Rights

United States labour legislation did not deal at length with internal union problems until the passage in 1959 of the Labor-Management Reporting and Disclosure Act. Title I of the said Act is known as the Bill of Rights.

Equality of membership is guaranteed by section 101(a)(1) which provides that "every member of a labor organization shall have equal

rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by laws."

Other freedoms protected in the Act are the freedoms of speech and assembly (s. 101(2)), right of members generally to establish the rates of dues, initiation fees and assessments (s. 101(3)) by secret ballot and majority vote, and the protection of the right to sue the labour organizations after exhausting reasonable internal hearing procedures up to a period of four months (s. 101(4)).

Expulsion from a labour organization by means of procedures contrary to natural justice is prohibited by the following:

"No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defence; (C) afforded a full and fair hearing."

The freedom of speech and assembly section reads:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligation."

5. Enforcement and Procedures

- (a) National Labor Relations Act. The National Labor Relations Board is given full investigatory power (s. 11) as well as enforcement

rights if a breach of the Act is found (s. 10). Powers of the Board include issuing cease and desist orders and ordering reinstatement with back pay where appropriate.

- (b) Labor-Management Reporting and Disclosure Act. The Labor-Management Reporting and Disclosure Act provides both civil and criminal enforcement of the rights guaranteed by Title I. Sections 102 and 609 allow civil actions by persons whose rights under Title I have been infringed.

Section 610 establishes protection of rights guaranteed by the Act through criminal proceedings whereby a person may be fined not more than \$1,000 or imprisoned for not more than one year, or both for depriving the rights guaranteed under the Act by means of force, violence or threat.

VIII

Additional Matters

1. Notes Not Exhaustive

The preceding Canadian legislative sections are not exhaustive of the matters that arise in relation to expulsion and admission. Additional areas include: (1) status and suability of unions; (2) coercion and intimidation in the exercise of employee rights; (3) protection of witnesses' rights; (4) renewal of agreements and employee termination of bargaining rights; (5) fair representation in the administration of the collective agreement; (6) financial statements and membership rights. The Notes do not touch the development of independent union procedures.

2. The 1949 C.B.A. Resolution

At the 1949 Annual Meeting of the Association the following resolution was adopted (see, Osler, Correspondence (1952), 30 Can. Bar Rev. 320):

"Be It Resolved: That the proper representation be made to the Ministers of Labour for the Dominion of Canada and the respective Province to amend existing industrial relations legislation providing that, notwithstanding anything contained in a collective agreement, no employer shall be required to discharge, or to discriminate against, any employee as to whom membership in a trade union has been refused or terminated on any ground other than the failure of such employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership, unless the employer agrees that the ground advanced by the union for refusing or terminating the membership is just and reasonable; or, failing such agreement, unless the issue is referred to a Board of Arbitration constituted in accordance with the arbitration provisions of the agreement, and such Board, or a majority of such Board, declares that the ground upon which the union refused or terminated the membership of such employee was sufficiently reasonable and just to justify his discharge by the employer."

Case Table

by year of citation

- 1861 McMillan v. Free Church of Scotland (1861), 23 Dunl. (Ct. of Sess.) 1314.
- 1880 Rigby v. Connal (1880), L.R. 14 Ch. D. 482.
- 1883 Essery v. Court Pride of the Dominion, [1883] 2 O.R. 596.
- 1897 Beaulieu v. Cochrane (1897), 29 O.R. 151, rev'd. 29 O.R. 598.
- 1908 Graham v. Bricklayers and Masons Union (1908), 9 W.L.R. 475 (B.C.C.A.).
- 1925 Caven v. C.P.R., [1925] 3 D.L.R. 841 (P.C.).
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APPENDIX J

Labor-Management Reporting and Disclosure Act of 1959, As Amended¹

[Revised text ¹ showing in bold face new or amended language provided by Public Law 89—216, as enacted September 29, 1965, 79 Stat. 888]

AN ACT

73 Stat. 519.

To provide for the reporting and disclosure of certain financial transactions and administrative practices of labor organizations and employers, to prevent abuses in the administration of trusteeships by labor organizations, to provide standards with respect to the election of officers of labor organizations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Labor-Management Reporting and Disclosure Act of 1959.”

¹ Public Law 257, 86th Cong. (73 Stat. 519–546), as amended by Public Law 216, 89th Cong. (79 Stat. 888). This revised text has been prepared by the U.S. Department of Labor.

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Declaration of Findings, Purposes, and Policy (29 U.S.C. 401)

73 Stat. 519.

SEC. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce.

61 Stat. 136;
29 U.S.C. 141.
44 Stat. 577;
45 U.S.C. 151.

Definitions

73 Stat. 520.

(29 U.S.C. 402)

SEC. 3. For the purposes of titles I, II, III, IV, V (except section 505), and VI of this Act—

(a) "Commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(b) "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

67 Stat. 462.

(c) "Industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting

commerce" within the meaning of the Labor Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended.

(d) "Person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(e) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

(f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

(g) "Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(h) "Trusteeship" means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or

73 Stat. 521.

61 Stat. 136;
29 U.S.C. 167.
44 Stat. 577;
45 U.S.C. 151.

(2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

(k) "Secret ballot" means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed.

(l) "Trust in which a labor organization is interested" means a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.

(n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

(o) "Member" or "member in good standing", when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

(p) "Secretary" means the Secretary of Labor.

(q) "Officer, agent, shop steward, or other representative", when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried nonsupervisory professional staff, stenographic, and service personnel.

(r) "District court of the United States" means a United States district court and a United States court of any place subject to the jurisdiction of the United States. 73 Stat. 522.

TITLE I—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

Bill of Rights

(29 U.S.C. 411)

SEC. 101. (a)(1) **EQUAL RIGHTS.**—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) **FREEDOM OF SPEECH AND ASSEMBLY.**—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) **DUES, INITIATION FEES, AND ASSESSMENTS.**—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) **PROTECTION OF THE RIGHT TO SUE.**—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) **SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.**—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Civil Enforcement

(29 U.S.C. 412)

SEC. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Retention of Existing Rights

(29 U.S.C. 413)

SEC. 103. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

Right to Copies of Collective Bargaining Agreements

(29 U.S.C. 414)

SEC. 104. It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each collective bargaining agreement made by such labor organization with any employer to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. The provisions of section 210 shall be applicable in the enforcement of this section.

Information as to Act

(29 U.S.C. 415)

SEC. 105. Every labor organization shall inform its members concerning the provisions of this Act.

TITLE II—REPORTING BY LABOR ORGANIZATIONS, OFFICERS AND EMPLOYEES OF LABOR ORGANIZATIONS, AND EMPLOYERS

73 Stat. 524.

Report of Labor Organizations

(29 U.S.C. 431)

SEC. 201. (a) Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information—

- (1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this title;

- (2) the name and title of each of its officers;
- (3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;
- (4) the regular dues or fees of other periodic payments required to remain a member of the reporting labor organization; and
- (5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements, showing the provisions made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D) authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b).

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

- (1) assets and liabilities at the beginning and end of the fiscal year;
- (2) receipts of any kind and the sources thereof;
- (3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than \$10,000 in the aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;
- (4) direct and indirect loans made to any officer, employee, or member, which aggregated more than \$250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;
- (5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof; all in such categories as the Secretary may prescribe.

(c) Every labor organization required to submit a report under this title shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion,

in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

(d) Subsections (f), (g), and (h) of section 9 of the National Labor Relations Act, as amended, are hereby repealed.

61 Stat. 143;
29 U.S.C. 159.

(e) Clause (i) of section 8(a)(3) of the National Labor Relations Act, as amended, is amended by striking out the following: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h)".

29 U.S.C. 158.

Report of Officers and Employees of Labor Organizations

(29 U.S.C. 432)

SEC. 202. (a) Every officer of a labor organization and every employee of a labor organization (other than an employee performing exclusively clerical or custodial services) shall file with the Secretary a signed report listing and describing for his preceding fiscal year—

(1) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child derived directly or indirectly from, an employer whose employees such labor organization represents or is actively seeking to represent, except payments and other benefits received as a bona fide employee of such employer;

(2) any transaction in which he or his spouse or minor child engaged, directly or indirectly, involving any stock, bond, security, or loan to or from, or other legal or equitable interest in the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(3) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, any business a substantial part of which consists of buying from, selling or leasing to, or otherwise dealing with, the business of an employer whose employees such labor organization represents or is actively seeking to represent;

(4) any stock, bond, security, or other interest, legal or equitable, which he or his spouse or minor child directly or indirectly held in, and any income or any other benefit with monetary value (including reimbursed expenses) which he or his spouse or minor child directly or indirectly derived from, a business any part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with such labor organization;

73 Stat. 526.

(5) any direct or indirect business transaction or arrangement between him or his spouse or minor child and any employer whose employees his organization represents or is actively seeking to represent, except work performed and payments and benefits received as a bona fide employee of such employer and except purchases and sales of goods or services in the regular course of business at prices generally available to any employee of such employer; and

(6) any payment of money or other thing of value (including reimbursed expenses) which he or his spouse or minor child received directly or indirectly from any employer or any person who acts as a labor relations consultant to an employer, except payments of the kinds referred to in section

302(c) of the Labor Management Relations Act, 1947, as amended.

(b) The provisions of paragraphs (1), (2), (3), (4), and (5) of subsection (a) shall not be construed to require any such officer or employee to report his bona fide investments in securities traded on a securities exchange registered as a national securities exchange under the Securities Exchange Act of 1934, in shares in an investment company registered under the Investment Company Act of 1940, or in securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, or to report any income derived therefrom.

(c) Nothing contained in this section shall be construed to require any officer or employee of a labor organization to file a report under subsection (a) unless he or his spouse or minor child holds or has held an interest, has received income or any other benefit with monetary value or a loan, or has engaged in a transaction described therein.

Report of Employers

(29 U.S.C. 433)

SEC. 203. (a) Every employer who in any fiscal year made—

(1) any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefor, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization, except (A) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and (B) payments of the kind referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended;

(2) any payment (including reimbursed expenses) to any of his employees, or any group or committee of such employees, for the purpose of causing such employee or group or committee of employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees;

(3) any expenditure, during the fiscal year, where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

(4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or

(5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision (4);

48 Stat. 881;
15 U.S.C. 78a
54 Stat. 789;
15 U.S.C. 80a-51.
49 Stat. 803;
15 U.S.C. 79.

73 Stat. 527.

shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

(b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

(c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

(d) Nothing contained in this section shall be construed to require an employer to file a report under subsection (a) unless he has made an expenditure, payment, loan, agreement, or arrangement of the kind described therein. Nothing contained in this section shall be construed to require any other person to file a report under subsection (b) unless he was a party to an agreement or arrangement of the kind described therein.

73 Stat. 528.

(e) Nothing contained in this section shall be construed to require any regular officer, supervisor, or employee of an employer to file a report in connection with services rendered to such employer nor shall any employer be required to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer.

(f) Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act, as amended.

29 U.S.C. 158.

(g) The term "interfere with, restrain, or coerce" as used in this section means interference, restraint, and coercion which, if done with respect to the exercise of rights guaranteed in section 7 of the National Labor Relations Act, as amended, would, under section 8(a) of such Act, constitute an unfair labor practice.

Attorney-Client Communications Exempted (29 U.S.C. 434)

SEC. 204. Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

Reports Made Public Information (29 U.S.C. 435)

SEC. 205. (a)² The contents of the reports and documents filed with the Secretary pursuant to sections 201, 202, **203, and 211** shall be public information, and the Secretary may publish any information and data which he obtains pursuant to the provisions of this title. The Secretary may use the information and data for statistical and research purposes, and compile and publish such studies, analyses, reports, and surveys based thereon as he may deem appropriate.

(b)³ The Secretary shall by regulation make reasonable provision for the inspection and examination, on the request of any person, of the information and data contained in any report or other document filed with him pursuant to section 201, 202, **203, or 211.**

(c)⁴ The Secretary shall by regulation provide for the furnishing by the Department of Labor of copies of reports or other documents filed with the Secretary pursuant to this title, upon payment of a charge based upon the cost of the service. The Secretary shall make available without payment of a charge, or require any person to furnish, to such State agency as is designated by law or by the Governor of the State in which such person has his principal place of business or headquarters, upon request of the Governor of such State, copies of any reports and documents filed by such person with the Secretary pursuant to section 201, 202, **203, or 211,** or of information and data contained therein. No person shall be required by reason of any law of any State to furnish to any officer or agency of such State any information included in a report filed by such person with the Secretary pursuant to the provisions of this title, if a copy of such report, or of the portion thereof containing such information, is furnished to such officer or agency. All moneys received in payment of such charges fixed by the Secretary pursuant to this subsection shall be deposited in the general fund of the Treasury.

² Prior to amendment by section 2(a) of Public Law 89-216, the first sentence of section 205(a) read as follows: "Sec. 205. (a) The contents of the reports and documents filed with the Secretary pursuant to sections 201, 202, and 203 shall be public information, and the Secretary may publish any information and data which he obtains pursuant to the provisions of this title."

³ Prior to amendment by section 2(b) of Public Law 89-216, section 205(b) read as follows: "(b) The Secretary shall by regulation make reasonable provision for the inspection and examination, on the request of any person, of the information and data contained in any report or other document filed with him pursuant to section 201, 202, or 203."

⁴ Prior to amendment by section 2(c) of Public Law 89-216, the second sentence of section 205(c) read as follows: "The Secretary shall make available without payment of a charge, or require any person to furnish, to such State agency as is designated by law or by the Governor of the State in which such person has his principal place of business or headquarters, upon request of the Governor of such State, copies of any reports and documents filed by such person with the Secretary pursuant to section 201, 202, or 203, or of information and data contained therein."

Retention of Records

(29 U.S.C. 436)

SEC. 206. Every person required to file any report under this title shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Secretary may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

Effective Date

(29 U.S.C. 437)

SEC. 207. (a) Each labor organization shall file the initial report required under section 201(a) within ninety days after the date on which it first becomes subject to this Act.

(b)⁵ Each person required to file a report under section 201(b), 202, 203(a), the second sentence of section 203(b), or section 211 shall file such report within ninety days after the end of each of its fiscal years; except that where such person is subject to section 201(b), 202, 203(a), the second sentence of section 203(b), or section 211, as the case may be, for only a portion of such a fiscal year (because the date of enactment of this Act occurs during such person's fiscal year or such person becomes subject to this Act during its fiscal year) such person may consider that portion as the entire fiscal year in making such report.

Rules and Regulations

(29 U.S.C. 438)

SEC. 208. The Secretary shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements. In exercising his power under this section the Secretary shall prescribe by general rule simplified reports for labor organizations or employers for whom he finds that by virtue of their size a detailed report would be unduly burdensome, but the Secretary may revoke such provision for simplified forms of any labor organization or employer if he determines, after such investigation as he deems proper and due notice and opportunity for a hearing, that the purposes of this section would be served thereby.

Criminal Provisions

(29 U.S.C. 439)

SEC. 209. (a) Any person who willfully violates this title shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(b) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this

⁵ Prior to amendment by section 2(d) of Public Law 89-216, section 207(b) read as follows: "(b) Each person required to file a report under section 201(b), 202, 203(a), or the second sentence of 203(b) shall file such report within ninety days after the end of each of its fiscal years; except that where such person is subject to section 201(b), 202, 203(a), or the second sentence of 203(b), as the case may be, for only a portion of such a fiscal year (because the date of enactment of this Act occurs during such person's fiscal year or such person becomes subject to this Act during its fiscal year) such person may consider that portion as the entire fiscal year in making such report."

title shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(c) Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this title shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(d) Each individual required to sign reports under sections 201 and 203 shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.

Civil Enforcement

(29 U.S.C. 440)

SEC. 210. Whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate. Any such action may be brought in the district court of the United States where the violation occurred or, at the option of the parties, in the United States District Court for the District of Columbia.

Surety Company Reports⁶

(29 U.S.C. 441)

Sec. 211. Each surety company which issues any bond required by this Act or the Welfare and Pension Plans Disclosure Act shall file annually with the Secretary, with respect to each fiscal year during which any such bond was in force, a report, in such form and detail as he may prescribe by regulation, filed by the president and treasurer or corresponding principal officers of the surety company, describing its bond experience under each such Act, including information as to the premiums received, total claims paid, amounts recovered by way of subrogation, administrative and legal expenses and such related data and information as the Secretary shall determine to be necessary in the public interest and to carry out the policy of the Act. Notwithstanding the foregoing, if the Secretary finds that any such specific information cannot be practicably ascertained or would be uninformative, the Secretary may modify or waive the requirement for such information.

TITLE III—TRUSTEESHIPS

Reports

(29 U.S.C. 461)

SEC. 301. (a) Every labor organization which has or assumes trusteeship over any subordinate labor organization shall file with the Secretary within thirty days after the date of the enactment of this Act or the imposition of any such trusteeship, and semiannually thereafter, a report, signed by its president and treasurer or corresponding principal officers, as well as by the trustees of such subordinate labor organization, containing the following information: (1) the name and address of the subordinate organization; (2) the date of establishing the trusteeship; (3) a detailed statement of the reason or reasons for establishing or continuing the trusteeship; and (4) the nature and extent of participation by the membership of the subordinate organization in the selection of delegates to represent such organization in regular or special conventions or other policy-determining bodies and in the election of officers of the labor organization which has assumed trusteeship over such subordinate organization. The initial report

⁶ Section 211 was added by section 3 of Public Law 89-216 (79 Stat. 888).

73 Stat. 530.

72 Stat. 997;
29 U.S.C. 301 note.

shall also include a full and complete account of the financial condition of such subordinate organization as of the time trusteeship was assumed over it. During the continuance of a trusteeship the labor organization which has assumed trusteeship over a subordinate labor organization shall file on behalf of the subordinate labor organization the annual financial report required by section 201(b) signed by the president and treasurer or corresponding principal officers of the labor organization which has assumed such trusteeship and the trustees of the subordinate labor organization.

(b) The provisions of section 201(c), 205, 206, 208, and 210 shall be applicable to reports filed under this title.

(c) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(d) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any report required under the provisions of this section or willfully makes any false entry in or willfully withholds, conceals, or destroys any documents, books, records, reports, or statements upon which such report is based, shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(e) Each individual required to sign a report under this section shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

Purposes for Which a Trusteeship May Be Established

73 Stat. 531.

(29 U.S.C. 462)

SEC. 302. Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

Unlawful Acts Relating to Labor Organization Under Trusteeship

(29 U.S.C. 463)

SEC. 303. (a) During any period when a subordinate body of a labor organization is in trusteeship, it shall be unlawful (1) to count the vote of delegates from such body in any convention or election of officers of the labor organization unless the delegates have been chosen by secret ballot in an election in which all the members in good standing of such subordinate body were eligible to participate or (2) to transfer to such organization any current receipts or other funds of the subordinate body except the normal per capita tax and assessments payable by subordinate bodies not in trusteeship: *Provided*, That nothing herein contained shall prevent the distribution of the assets of a labor organization in accordance with its constitution and bylaws upon the bona fide dissolution thereof.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

Enforcement

(29 U.S.C. 464)

SEC. 304. (a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this title (except section 301) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation

has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

(b) For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship.

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

73 Stat. 532.

Report to Congress

(29 U.S.C. 465)

SEC. 305. The Secretary shall submit to the Congress at the expiration of three years from the date of enactment of this Act a report upon the operation of this title.

Complaint by Secretary

(29 U.S.C. 466)

SEC. 306. The rights and remedies provided by this title shall be in addition to any and all other rights and remedies at law or in equity: *Provided*, That upon the filing of a complaint by the Secretary the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be *res judicata*.

TITLE IV—ELECTIONS

Terms of Office; Election Procedures

(29 U.S.C. 481)

SEC. 401. (a) Every national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot.

(b) Every local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing.

(c) Every national or international labor organization, except a federation of national or international labor organizations, and every local labor organization, and its officers, shall be under a duty, enforceable at the suit of any bona fide

candidate for office in such labor organization in the district court of the United States in which such labor organization maintains its principal office, to comply with all reasonable requests of any candidate to distribute by mail or otherwise at the candidate's expense campaign literature in aid of such person's candidacy to all members in good standing of such labor organization and to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members, and whenever such labor organizations or its officers authorize the distribution by mail or otherwise to members of campaign literature on behalf of any candidate or of the labor organization itself with reference to such election, similar distribution at the request of any other bona fide candidate shall be made by such labor organization and its officers, with equal treatment as to the expense of such distribution. Every bona fide candidate shall have the right, once within 30 days prior to an election of a labor organization in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment, which list shall be maintained and kept at the principal office of such labor organization by a designated official thereof. Adequate safeguards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots.

(d) Officers of intermediate bodies, such as general committees, system boards, joint boards, or joint councils, shall be elected not less often than once every four years by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot. 73 Stat. 533.

(e) In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof. Not less than fifteen days prior to the election notice thereof shall be mailed to each member at his last known home address. Each member in good standing shall be entitled to one vote. No member whose dues have been withheld by his employer for payment to such organization pursuant to his voluntary authorization provided for in a collective bargaining agreement shall be declared ineligible to vote or be a candidate for office in such organization by reason of alleged delay or default in the payment of dues. The votes cast by members of each local labor organization shall be counted, and the results published, separately. The election officials designated in the constitution and bylaws or the secretary, if no other official is designated, shall preserve for one year the ballots and all other records pertaining to the election. The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this title.

(f) When officers are chosen by a convention of delegates elected by secret ballot, the convention shall be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of this title. The officials designated in the constitution and bylaws or the secretary, if no other is designated, shall preserve for one year the credentials of the delegates and all minutes and other records of the convention pertaining to the election of officers.

(g) No moneys received by any labor organization by way of dues, assessment, or similar levy, and no moneys of an employer shall be contributed or applied to promote the candidacy of any person in an election subject to the provisions of this title. Such moneys of a labor organization may be utilized for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of an election.

(h) If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

(i) The Secretary shall promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures to which reference is made in subsection (h).

73 Stat. 534.

Enforcement

(29 U.S.C. 482)

SEC. 402. (a) A member of a labor organization—

(1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or

(2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,

may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election and removal of officers). The challenged election shall be presumed valid pending a final decision thereon (as hereinafter provided) and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization.

(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 401, or

(2) that the violation of section 401 may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization. The Secretary shall promptly certify to the court the names of the persons elected,

and the court shall thereupon enter a decree declaring such persons to be the officers of the labor organization. If the proceeding is for the removal of officers pursuant to subsection (h) of section 401, the Secretary shall certify the results of the vote and the court shall enter a decree declaring whether such persons have been removed as officers of the labor organization.

(d) An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same manner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

Application of Other Laws

(29 U.S.C. 483)

SEC. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive.

Effective Date

(29 U.S.C. 484)

73 Stat. 535.

SEC. 404. The provisions of this title shall become applicable—

(1) ninety days after the date of enactment of this Act in the case of a labor organization whose constitution and bylaws can lawfully be modified or amended by action of its constitutional officers or governing body, or

(2) where such modification can only be made by a constitutional convention of the labor organization, not later than the next constitutional convention of such labor organization after the date of enactment of this Act, or one year after such date, whichever is sooner. If no such convention is held within such one-year period, the executive board or similar governing body empowered to act for such labor organization between conventions is empowered to make such interim constitutional changes as are necessary to carry out the provisions of this title.

TITLE V—SAFEGUARDS FOR LABOR ORGANIZATIONS

Fiduciary Responsibility of Officers of Labor Organizations

(29 U.S.C. 501)

SEC. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general

exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

Bonding

(29 U.S.C. 502)

SEC. 502. (a)⁷ Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed \$5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others. The bond of each such person shall be fixed at the beginning of the organization's fiscal year and shall be in an amount not less than 10 per centum of the funds handled by him and his predecessor or predecessors, if any, during the preceding fiscal year, but in no case more than \$500,000. If the labor organization or the trust in which a labor organization is interested does not have a preceding fiscal year, the amount of the bond shall be, in the case of a local labor organization, not less than \$1,000, and in the case of any other labor organization or of a trust in which a labor organization is interested, not less than \$10,000. Such bonds shall be individual or schedule in form, and shall have a corporate surety company as surety thereon. Any person who is not covered by such bonds shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested. No such bond shall be placed through an agent or broker or with a surety company in which any labor organization or any officer, agent, shop steward, or other representative of a labor organization has any direct or indirect interest. Such surety company shall be a corporate surety which holds a grant of authority from the Secretary of the Treasury under the Act of July 30,

⁷ Prior to amendment by section 1 of Public Law 89-216, the first sentence of section 502(a) read as follows: "Sec. 502. (a) Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed \$5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded for the faithful discharge of his duties." Section 1 of Public Law 89-216 also added the proviso at the end of section 502(a).

1947 (6 U.S.C. 6-13), as an acceptable surety on Federal bonds: **Provided, That** when in the opinion of the Secretary a labor organization has made other bonding arrangements which would provide the protection required by this section at comparable cost or less, he may exempt such labor organization from placing a bond through a surety company holding such grant of authority. 61 Stat. 648.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

Making of Loans; Payment of Fines

(29 U.S.C. 503)

SEC. 503. (a) No labor organization shall make directly or indirectly any loan or loans to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of \$2,000.

(b) No labor organization or employer shall directly or indirectly pay the fine of any officer or employee convicted of any willful violation of this Act.

(c) Any person who willfully violates this section shall be fined not more than \$5,000 or imprisoned for not more than one year, or both.

Prohibition Against Certain Persons Holding Office

(29 U.S.C. 504)

SEC. 504. (a) No person who is or has been a member of the Communist Party ⁸ or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of title II or III of this Act, or conspiracy to commit any such crimes, shall serve— 73 Stat. 537.

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization, during or for five years after the termination of his membership in the Communist Party, ⁸ or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of this Act. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, county, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

⁸ The U.S. Supreme Court, on June 7, 1965, held unconstitutional as a bill of attainder the section 504 provision which imposes criminal sanctions on Communist Party members for holding union office (*U.S. v. Brown*, 381 U.S. 437, 85 S. Ct. 1707).

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after the date of enactment of this Act.

Amendment to Section 302, Labor Management Relations Act, 1947

SEC. 505. Subsections (a), (b), and (c) of section 302 of the Labor Management Relations Act, 1947, as amended, are amended to read as follows:

"SEC. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

"(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

"(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or pur-

chase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event of the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds.”

73 Stat. 539.

TITLE VI—MISCELLANEOUS PROVISIONS

Investigations

(29 U.S.C. 521)

SEC. 601. (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the rea-

sons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him.

38 Stat. 717.

Extortionate Picketing

(29 U.S.C. 522)

SEC. 602. (a) It shall be unlawful to carry on picketing on or about the premises of any employer for the purpose of, or as part of any conspiracy or in furtherance of any plan or purpose for, the personal profit or enrichment of any individual (except a bona fide increase in wages or other employee benefits) by taking or obtaining any money or other thing of value from such employer against his will or with his consent.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned not more than twenty years, or both.

73 Stat. 540.

Retention of Rights Under Other Federal and State Laws

(29 U.S.C. 523)

SEC. 603. (a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

(b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended.

44 Stat. 577;
45 U.S.C. 151.

61 Stat. 136;
29 U.S.C. 167.

Effect on State Laws

(29 U.S.C. 524)

SEC. 604. Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

Service of Process

(29 U.S.C. 525)

SEC. 605. For the purposes of this Act, service of summons, subpoena, or other legal process of a court of the United States upon an officer or agent of a labor organization in his capacity as such shall constitute service upon the labor organization.

Administrative Procedure Act

(29 U.S.C. 526)

SEC. 606. The provisions of the Administrative Procedure Act shall be applicable to the issuance, amendment, or rescission of any rules or regulations, or any adjudication, authorized or required pursuant to the provisions of this Act. 60 Stat. 237;
5 U.S.C. 1001 note.

Other Agencies and Departments

(29 U.S.C. 527)

SEC. 607. In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this Act. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this Act or other Federal law. 73 Stat. 541.

Criminal Contempt

(29 U.S.C. 528)

SEC. 608. No person shall be punished for any criminal contempt allegedly committed outside the immediate presence of the court in connection with any civil action prosecuted by the Secretary or any other person in any court of the United States under the provisions of this Act unless the facts constituting such criminal contempt are established by the verdict of the jury in a proceeding in the district court of the United States, which jury shall be chosen and empaneled in the manner prescribed by the law governing trial juries in criminal prosecutions in the district courts of the United States.

Prohibition on Certain Discipline by Labor Organization

(29 U.S.C. 529)

SEC. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

Deprivation of Rights Under Act by Violence

(29 U.S.C. 530)

SEC. 610. It shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act. Any person who willfully violates this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

Separability Provisions

(29 U.S.C. 531)

SEC. 611. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

TITLE VII—AMENDMENTS TO THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

Federal-State Jurisdiction

29 U.S.C. 164.

SEC. 701. (a) Section 14 of the National Labor Relations Act, as amended, is amended by adding at the end thereof the following new subsection:

73 Stat. 542.

“(c) (1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

“(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.”

29 U.S.C. 153.

(b) Section 3(b) of such Act is amended to read as follows:

29 U.S.C. 159.

“(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designed pursuant to the first sentence thereof. The Board shall have an official seal which shall be judicially noticed.”

Economic Strikers

29 U.S.C. 159.

SEC. 702. Section 9(c)(3) of the National Labor Relations Act, as amended, is amended by amending the second sentence thereof to read as follows: “Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.”

Vacancy in Office of General Counsel

SEC. 703. Section 3(d) of the National Labor Relations Act, as amended, 29 U.S.C. 153.
is amended by adding after the period at the end thereof the following: "In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted."

Boycotts and Recognition Picketing

SEC. 704. (a) Section 8(b)(4) of the National Labor Relations Act, as 29 U.S.C. 158.
amended, is amended to read as follows:

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in 73 Stat. 543.
an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom

the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;”.

29 U.S.C. 158.

(b) Section 8 of the National Labor Relations Act, as amended, is amended by adding at the end thereof the following new subsection:

73 Stat. 544.

“(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms ‘any employer’, ‘any person engaged in commerce or any industry affecting commerce’, and ‘any person’ when used in relation to the terms ‘any other producer, processor, or manufacturer’, ‘any other employer’, or ‘any other person’ shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.”

(c) Section 8(b) of the National Labor Relations Act, as amended, is amended by striking out the word “and” at the end of paragraph (5), striking out the period at the end of paragraph (6), and inserting in lieu thereof a semicolon and the word “and”, and adding a new paragraph as follows:

“(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

“(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

“(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

“(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be

appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

(d) Section 10(1) of the National Labor Relations Act, as amended, is amended by adding after the words "section 8(b)," the words "or section 8(e) or section 8(b)(7)," and by striking out the period at the end of the third sentence and inserting in lieu thereof a colon and the following: "*Provided further*, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue." 29 U.S.C. 160. 73 Stat. 545.

(e) Section 303(a) of the Labor Management Relations Act, 1947, is amended to read as follows: 29 U.S.C. 187.

"(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended."

Building and Construction Industry

SEC. 705. (a) Section 8 of the National Labor Relations Act, as amended by section 704(b) of this Act, is amended by adding at the end thereof the following new subsection: 29 U.S.C. 158.

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

(b) Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Priority in Case Handling

29 U.S.C. 160.

SEC. 706. Section 10 of the National Labor Relations Act, as amended, is amended by adding at the end thereof a new subsection as follows:

“(m) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1).”

73 Stat. 546.

Effective Date of Amendments

SEC. 707. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act and no provision of this title shall be deemed to make an unfair labor practice, any act which is performed prior to such effective date which did not constitute an unfair labor practice prior thereto.

Approved September 14, 1959.

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APPENDIX K

LA PRISE CONSCIENTE DES DECISIONS DANS LES SYNDICATS DEMOCRATIQUES

RESUME

INTRODUCTION

Notre propos est d'examiner ce qu'est la prise consciente de décisions par des syndicats démocratiques, en tant qu'émanation de l'unité de négociation dans son ensemble, et non pas seulement de la majorité des personnes de cette unité, qui forment un syndicat. Pour ce faire, nous avons eu recours à divers types de documents, et notamment aux principales lois du Canada et des pays ayant des régimes de négociations collectives comparables. Nous avons également eu recours à des documents secondaires. Des décisions de jurisprudence et celles de diverses agences administratives dans le domaine des relations de travail ont également fait l'objet d'une autre étude. Afin de donner une idée de l'ampleur des problèmes rencontrés, disons que notre étude a porté sur cinquante constitutions de syndicats, qui régissent les activités de plus d'un million d'adhérents syndicaux au Canada et qui en touchent de nombreux autres. Ce groupe comprenait notamment les onze principaux syndicats, et l'ensemble de notre étude a porté sur environ 52 p. 100 de tous les adhérents syndicaux au Canada. Enfin, nous avons procédé à la compilation d'un certain nombre de tableaux, afin d'établir le bilan des actions en justice et des décisions disciplinaires syndicales.

CHAPITRE I: LA SIGNIFICATION DE L'APPARTENANCE SYNDICALE

Deux traits essentiels de toute enquête portant sur les droits individuels des travailleurs touchés par un régime de négociations collectives sont, d'une part, la mesure dans laquelle les syndicats, en tant qu'agents accrédités, se sont vu accorder le contrôle exclusif des conditions d'emploi dans le groupe de négociation, et, d'autre part, la mesure dans laquelle les services fournis par les syndicats en question sont d'importance vitale pour leurs adhérents. Pour ce qui est du premier point, au Canada tout comme aux Etats-Unis, on a donné aux syndicats un contrôle absolu sur le contrat de travail. Deux considérations entrent en ligne de compte en ce qui concerne le second point: premièrement, les types et l'étendue des activités syndicales ont subi de profondes modifications au cours des récentes années, avec prolifération d'avantages économiques "marginaux" et engagements politiques croissants; deuxièmement, l'importance de ces avantages pour les membres et les non membres s'est accrue à mesure que la mobilité de l'emploi diminuait du fait de la charge économique que représentent l'embauchage de travailleurs relativement âgés, et l'automatisation. Par conséquent, ce qui compte aujourd'hui, ce n'est pas seulement la simple appartenance syndicale, mais encore et bien plus la mesure dans laquelle un syndiqué peut participer aux activités du syndicat, et les contrôler.

Ces deux points étant admis, résoudre leurs difficultés inhérentes constitue une tâche prodigieuse, que rend plus difficile encore la poursuite d'une politique judiciaire de non-intervention dans les questions d'appartenance syndicale et la prolifération de la législation de sécurité syndicale. Il est indiscutable que cette situation a occasionné certaines injustices, qui ont fait l'objet d'attaques portées de divers côtés; les critiques

continues à l'égard de la sécurité syndicale sont un lieu commun. Le point crucial de ces critiques est de savoir ce qui prévaudra: le point de vue de l'opportunité économique, ou celui de l'intégrité des droits de l'individu. Le dilemme qui se pose est donc de trouver le juste milieu entre la nécessité de maintenir l'unité syndicale en ce qui touche les qualités du syndicat en tant qu'agent de négociation, et celle de garantir à chacun le droit au travail. C'est ce dilemme que nous nous efforcerons de résoudre dans ce précis: la mise au point de lois destinées à protéger la "qualité" de l'appartenance syndicale.

Il existe deux tendances en ce qui concerne la politique sur laquelle devrait s'appuyer toute attitude à l'égard de la gestion syndicale: l'une qui estime qu'elle devrait s'inspirer dans toute la mesure du possible de ce que l'on appelle "les principes démocratiques", et l'autre qui affirme que la gestion syndicale doit être taillée sur mesure pour contribuer à la réalisation du but essentiel du syndicat, savoir la négociation et l'administration de conventions collectives acceptables par tous ses adhérents. Il faut reconnaître que la démocratie n'a guère prospéré dans les syndicats, si ce n'est à de très rares occasions à l'échelon le plus bas, et l'on ne peut prétendre qu'elle constitue un facteur concomitant indispensable à l'organisation syndicale. Par conséquent, on aurait tort d'avaler d'une seule bouchée les arguments des partisans de la liberté. Cela ne veut cependant pas dire qu'une telle attitude est totalement erronée. Il est évident qu'il y a des domaines dans lesquels les principes démocratiques sont susceptibles de fournir une base à la gestion syndicale et peut être faut-il admettre d'emblée qu'ils devraient être appliqués à moins que l'on ne puisse fournir la preuve du contraire; cependant, il y a des domaines dans lesquels un excès de démocratie ne profiterait à personne—qu'il

s'agisse du syndicat en tant qu'entité, de l'employeur, de l'industrie, de l'ensemble du pays ou même, et surtout, des travailleurs. Néanmoins, et bien qu'un tel état puisse être inaccessible, au moins faudrait-il qu'il soit valable et qu'il réponde aux aspirations des adhérents de la base. Tout ce qui a pu faire l'unanimité des diverses autorités se retrouve dans le rapport de la Commission Donovan, où l'accent a été mis sur la nécessité de la protection procédurale des membres et des non membres, plutôt que sur celle de "réformes démocratiques", et sur la nécessité du sens de leurs responsabilités parmi les dirigeants syndicalistes. Un syndicat doit donc être conscient de ses responsabilités tant vis-à-vis de ses membres que dans l'attitude qu'il adopte à l'égard de ce qu'il considère comme sa place dans l'économie.

Les différentes méthodes préconisées pour résoudre ces problèmes soulèvent également quelques difficultés. Sans trop approfondir la question, il apparaît néanmoins que la solution ne pourra venir ni de demandes de réformes internes ni de modifications du droit coutumier—l'indépendance et l'histoire militant contre une telle possibilité. Par conséquent, les changements ne peuvent être effectués que par voie législative. Quant à l'efficacité de telles mesures, il y a lieu de souligner que toute bonne législation doit prendre pour point de départ la compréhension du fait que les employeurs désirent ne négocier qu'avec des syndicats, que tout système qui permettrait simplement aux travailleurs de se passer du syndicat et de traiter individuellement avec l'employeur constituerait une protection illusoire, et que toute législation basée sur l'ouverture est vouée à la faillite, si l'on tient compte du bilan passé de cette solution.

CHAPITRE II: LE PROBLEME DE LA SECURITE SYNDICALE

Au cours des années qui se sont écoulées depuis la publication de la "Formule Rand" en 1946, des lois de sécurité syndicale ont été adoptées dans presque toutes les provinces du Canada; leur existence et leur validité sont maintenant un fait admis et reconnu dans les milieux de travail de notre pays. Bref, pour un très grand nombre de travailleurs canadiens, l'appartenance à un syndicat est devenue une condition sine qua non de maintien en emploi. De ce fait, et aussi à cause des passions que peut soulever son aspect obligatoire, un examen de ce domaine de la loi constitue une partie intégrante de la détermination du problème général discuté ici.

A l'exception de celles du Québec, presque toutes les lois canadiennes en matière de travail renferment maintenant des dispositions qui permettent aux parties d'une convention collective de négocier une clause de sécurité syndicale qui fait dépendre la continuité d'emploi du maintien de l'adhésion syndicale, lesdites lois s'efforçant de limiter l'application de ces clauses. Ainsi, afin d'assurer que les travailleurs puissent librement choisir ceux qui les représenteront lors des négociations, les lois interdisent généralement que ces clauses soient utilisées pour mettre fin à l'appartenance syndicale en cas de double représentation. Il existe également d'autres limitations. La Saskatchewan est la seule province dans laquelle une forme de clause de sécurité syndicale soit obligatoire. Dans cette province, lorsqu'un syndicat représente la majorité des employés d'une société, il peut exiger que celle-ci impose à tout nouveau travailleur, comme condition préalable à son emploi, l'adhésion à ce syndicat, et qu'elle oblige tous ceux qui en font partie à maintenir indéfiniment leur adhésion.

Ainsi également, et bien qu'il n'existe aucune loi concernant les précomptes au Nouveau-Brunswick ni au Manitoba, on trouve dans la plupart des provinces des clauses qui concernent cet aspect de la sécurité syndicale.

Les tribunaux, les commissions des relations de travail et les commissions d'arbitrage qui ont eu à connaître de ces clauses législatives ou contractuelles les ont dans la plupart des cas interprétées étroitement en faveur du travailleur syndiqué, donnant ainsi de nouvelles garanties à ce dernier. C'est à l'égard des articles traitant de l'appartenance syndicale obligatoire que cette tendance s'est manifestée le plus clairement. Les commissions d'arbitrage ont généralement utilisé le même raisonnement que les tribunaux, insistant sur le fait que la mise à pied des travailleurs constitue un droit de la direction, et même les commissions des relations de travail, lorsqu'elles ont eu à connaître de thèses voulant que le fait d'interdire aux employeurs le droit de mise à pied constitue une pratique injuste, ont soutenu que de telles clauses étaient de caractère "pénal" et que, par conséquent, elles devraient être interprétées en faveur des travailleurs. Lorsqu'il s'agissait de clauses de précompte, et sans doute parce que celles-ci n'impliquent pas de pertes d'emploi dans la même mesure que les clauses d'appartenance syndicale, les organismes judiciaires et quasi-judiciaires se sont parfois montrés plus enclins à donner une interprétation assez large aux clauses législatives négociées dont elles ont eu à connaître. Dans l'ensemble, et même lorsqu'il s'agissait de conflits portant sur des précomptes, les causes semblent toujours indiquer une prédisposition de la part des tribunaux à accepter les interprétations favorables aux travailleurs. Ainsi, les tribunaux ont eu tendance à limiter le recours aux clauses de sécurité syndicale; ceci n'assure que peu de protection lorsqu'il y a, comme on l'a souligné, très peu de contrôle sur l'essence même des clauses.

Il nous a été quelque peu difficile de trouver des statistiques dignes de foi sur l'étendue exacte des clauses de sécurité syndicale au Canada. Néanmoins, il était évident qu'environ 66 p. 100 des travailleurs touchés par la présente étude étaient soumis à l'une ou l'autre clause faisant de l'appartenance syndicale une obligation, tandis que 96 p. 100 étaient touchés par une clause de précompte.

Nous avons entrepris l'examen des objections théoriques à l'encontre de la sécurité syndicale. Nous avons noté que la plupart de ces objections portent sur son fonctionnement, plutôt que sur la théorie dont elle se réclame. De ce fait, il nous semble que la diminution ou l'élimination de ces abus pourrait complètement modifier la nature de l'opposition à l'égard de la sécurité syndicale.

Le principal argument à l'encontre de la sécurité syndicale est qu'elle contribue à maintenir des dirigeants syndicaux à leurs postes contrairement aux principes démocratiques. Si cette accusation s'avérait vraie, il s'agirait d'un vice réel. La solution de ce dernier nous paraît cependant résider bien davantage dans le domaine des admissions au syndicat, du droit de vote et de la nature des réunions syndicales. Nous croyons qu'une amélioration dans ce domaine amoindrirait considérablement cette objection.

Une deuxième objection est que l'on peut aisément contourner par diverses méthodes des lois visant à assurer l'accès équitable à l'adhésion syndicale dans les cas où il y a sécurité syndicale. A cet égard, il a été soutenu qu'un droit d'adhésion initial élevé ou le paiement de cotisations syndicales excessives ont pour effet d'entraver le libre accès aux syndicats. Nous sommes d'avis que cette difficulté pourrait être palliée par une disposition législative stipulant que ces cotisations devront être "raisonnables", la

définition de ce que l'on entend par raisonnable étant du ressort d'une commission des relations de travail. Le contrôle des bureaux d'embauche constitue une deuxième difficulté, car il importe d'éviter que les syndiqués ne soient traités de façon injuste. Une solution à ce problème résiderait dans le recours à des dispatchers du gouvernement. Une troisième méthode consisterait dans l'utilisation des clauses d'ancienneté pour défavoriser les nouveaux adhérents. Nous n'avons trouvé aucune preuve de cette dernière assertion, et nous ne jugeons donc pas nécessaire de prévoir une clause spéciale à cet égard. La dernière difficulté réside dans le fait qu'une bonne partie des lois qui visent à protéger l'individu contre les abus résultant de la sécurité syndicale n'empêchent pas l'employeur de se mettre délibérément d'accord avec le syndicat pour congédier certains travailleurs. Il est évident qu'il y aurait lieu de tenir compte d'une telle tactique lors de la mise au point de dispositions législatives.

Un troisième point soulevé est que l'existence de la sécurité syndicale dépend des négociations entre l'employeur et le syndicat, dans lesquelles il n'est pas tenu compte des désirs des travailleurs. Comme nous l'avons signalé plus haut, cette accusation constitue une des bases de l'assaut porté contre la sécurité syndicale. Nous avons fait un examen minutieux de toutes les attitudes adoptées à l'égard de ce problème, et nous avons rejeté la position de la Saskatchewan qui rend l'une ou l'autre forme de sécurité syndicale obligatoire, et l'exigence selon laquelle les clauses de sécurité syndicale négociées doivent être entérinées par un vote de l'unité de négociation, étant donné que ce dernier point a pour résultats de modifier l'accord négocié entre le syndicat et l'entreprise et de permettre à l'employeur de provoquer une scission entre le syndicat et ses adhérents.

Quant à nous, nous préférierions une variante de l'exigence de la cotisation de représentation. En d'autres termes, nous pensons que nul ne devrait, en aucun cas, être tenu, sous peine de perdre son emploi, de payer plus que sa cotisation de négociation. Par conséquent, il y aurait lieu également de prévoir qu'une clause devienne obligatoire après accréditation. Cela éviterait de porter le différend à la table de négociations et dégagerait l'employé de l'obligation de promouvoir les intérêts de l'employeur.

CHAPITRE III: LE DROIT D'AFFILIATION SYNDICALE

Il a été noté précédemment que l'appartenance à un syndicat est d'une importance extrême pour toute personne soumise au régime des négociations collectives. Malheureusement, les tribunaux ont toujours soutenu que, en droit coutumier, un travailleur n'a pas le "droit" de faire partie d'un syndicat, étant donné que ce type d'association est assimilé à l'appartenance à un cercle privé. Une telle position nous apparaît injuste. Certains tribunaux ont cependant reconnu la nécessité de restreindre, dans une certaine mesure, les pouvoirs illimités dont jouissent les syndicats d'exclure certaines personnes de leurs rangs. Ainsi, en Angleterre, on constate un certain mouvement d'opinion selon lequel les tribunaux interviennent par voie de déclaration ou d'injonction pour imposer le respect des règlements syndicaux et des principes de ce qu'ils appellent la "justice naturelle", lors de l'admission de travailleurs au sein des syndicats. En Angleterre encore, une affaire plus récente a fait renaître la possibilité d'un contrôle judiciaire sur les exigences en matière d'admissibilité, du point de vue de leur caractère raisonnable et de la politique publique, et, ce qui est peut être plus important, la revendication d'un "droit" à l'admission syndicale, suffisant pour permettre au tribunal d' "empêcher le rejet arbitraire, capricieux ou déraisonnable d'un postulant qualifié".

Au Canada, certains tribunaux se sont rendu compte du caractère incongru de cette position et ont eu tendance à se montrer plus favorables à l'utilisation de leurs pouvoirs pour aider des candidats à l'admission. Ainsi, il a été soutenu qu'une personne ayant appartenu au syndicat a le droit de voir sa demande examinée par une commission appropriée, même si elle n'a aucun moyen d'obliger le syndicat à l'admettre dans ses rangs. Il a en outre été implicitement soutenu que ceci s'applique également à quiconque présente pour la première fois une demande d'adhésion. La position la plus nette a cependant été prise par un tribunal de la Colombie-Britannique, qui a déclaré que les négociations collectives avaient pour pendant une condition stipulant que les syndicats ne pourraient, sans raison valable, empêcher qui que ce soit de devenir membre d'un syndicat. Malheureusement, le Conseil privé a cassé ces décisions et a refusé de les accepter en tant que moyens susceptibles d'assurer le contrôle des lignes de conduite adoptées en matière d'admission syndicale. Cependant, étant donné qu'il a maintenant été mis fin aux pourvois en appel devant le Conseil privé, il est possible que l'on voie se manifester de nouveau, au Canada, des opinions similaires. On comprend difficilement la critique selon laquelle cela aurait pour effet d' "imposer une trop lourde charge aux juges, qui se trouveraient ainsi placés dans l'alternative insidieuse d'avoir à déterminer si un règlement régissant l'admission est ou n'est pas raisonnable"; les tribunaux doivent sans cesse se prononcer sur des critères collectifs de cette nature.

Des tentatives judiciaires visant à diminuer les inconvénients du règlement de droit coutumier se sont heurtées à la fois aux relations acceptées d'adhésion syndicale et à l'incapacité des tribunaux de découvrir une base sur laquelle il soit possible d'étayer le droit à l'adhésion d'un non membre. Les bases historiques de la nature de l'adhésion ont toujours été les thèses

de "propriété" ou de "contrat". Les résultats, du fait de leurs effets inévitables, se sont presque toujours avérés désastreux.

Il est préférable d'aborder les choses au moyen de deux autres méthodes appropriées à l'une et à l'autre des catégories de cas. Toutes deux se fondent sur ce que l'on pourrait appeler la diminution de la répugnance du judiciaire à intervenir, fait qui, comme il a été noté plus haut, est perceptible dans tous les pays de droit coutumier. La première est la théorie du "préjudice prima facie", à laquelle il a été fait allusion précédemment. Il existe, bien sûr, une certaine confusion entre cette théorie, qui met l'accent sur l'intention de causer un préjudice, et celle qui voulait que "la destruction du statut syndical du plaignant constitue un préjudice". Cette façon de lier le "statut" au "préjudice" ne s'est vue que dans des cas d'expulsion, étant donné que le statut requis n'a jamais pu être obtenu dans des situations d'admission. La seconde méthode est intimement liée à la doctrine du "droit au travail". On a soutenu que, du fait de la difficulté d'extraire la cause d'action de ce prétendu droit constitutionnel, on ne devrait recourir à cette méthode que pour conférer un locus standi au candidat rejeté.

Il est indubitable que la formulation et la protection législatives, directes des droits d'adhésion à un syndicat seraient préférables à un simple traitement jurisprudentiel de cette question: certaines politiques syndicales comportant des effets indirectement exclusifs, notamment les cotisations exorbitantes, les trop longues périodes d'apprentissage, les épreuves de compétence non réalistes, le népotisme, la discrimination à l'égard des femmes, etc., mettraient à dure épreuve l'ingéniosité de n'importe quel tribunal. Au Canada, une très faible proportion de cette

législation a été édictée les diverses lois sur les justes méthodes d'emploi, dont la loi fédérale constitue le prototype, étant les seules qui existent dans ce domaine. Ce qui est interdit à titre de délit est généralement, de la part d'un syndicat, le refus d'admission, l'expulsion, la suspension ou toute autre forme de discrimination à l'égard de ses membres du fait de leur race, de leur origine ethnique, de leur couleur ou de leur religion, les délits en question étant passibles d'amendes pouvant s'élever jusqu'à \$1,000. Toutefois, ces clauses semblent avoir été peu utilisées dans la pratique. Par conséquent, on peut affirmer sans crainte de se tromper que les lois existantes, du fait qu'elles se bornent à disposer du délit de discrimination, qui n'a donné lieu qu'à très peu de débats, ne sont pas viables si on les considère dans le contexte total de la protection du droit d'adhésion à un syndicat.

Par comparaison aux questions discutées précédemment à propos de l'administration des contrôles régulateurs en matière d'accréditation, dont sont investies les commissions des relations de travail, un certain degré de régulation s'est dégagé du refus, de la part des commissions, d'accréditer tout syndicat "non qualifié". On a admis qu'un syndicat "qualifié" pour être accrédité en vertu des lois relatives aux négociations collectives est un syndicat qui, de par ses statuts, peut accepter l'adhésion de tous les travailleurs faisant partie de l'unité à accréditer. Ce raisonnement se fonde sur la crainte d'une utilisation abusive de la sécurité syndicale. Etant donné que les statuts de plusieurs syndicats contiennent effectivement, du moins à l'origine, des limitations quant aux membres à l'égard desquels l'exclusive, généralement fondée sur des motifs d'ordre professionnel ou religieux, peut être prononcée, ces syndicats ont tenté de modifier ces dispositions en vue d'obtenir l'accréditation. Pour éviter que ces modifications

ne soient de simples trompe-l'oeil, les commissions exigeront des syndicats qu'ils se conforment strictement à leurs statuts, et qu'ils fournissent la preuve que les dispositions sont suffisamment claires et que lesdits statuts les autorisent à effectuer les modifications en question. Toutefois, on a pu constater récemment chez les tribunaux une propension à limiter la protection accordée à des adhérents sélectionnés des syndicats, cette modification se situant dans le domaine des limitations religieuses. Il est fort probable qu'il s'agit là de cas uniques car, comme l'a souligné le tribunal, les statuts syndicaux en question "fixent une norme de comportement social et moral qui ne peut soulever aucune objection de la part d'aucun citoyen respectueux des lois, quelle que soit sa profession". On peut supposer qu'une discrimination de nature moins émotive ne recevrait pas une interprétation aussi généreuse de la part d'un tribunal canadien.

En conclusion, la protection la plus efficace qui existe est celle qui résulte de la pratique des commissions des relations de travail, laquelle consiste à refuser l'accréditation aux syndicats qui pratiquent la discrimination à l'égard de leurs membres. Il faut cependant souligner que cette protection est limitée par le fait (i) que les travailleurs ainsi exclus sont rarement en mesure de profiter de cette façon de procéder, soit parce qu'ils n'en connaissent pas l'existence, ou parce qu'elle n'est pas en cours au moment du refus; (ii) qu'un tel refus d'accréditation ne fait qu'imposer une contrainte à un syndicat, sans nécessairement assurer l'adhésion d'un postulant et (iii) qu'une telle protection n'est généralement efficace qu'au moment de l'accréditation, mais non à l'égard de différents qui surgissent ultérieurement.

Quelques aspects assez obscurs de la loi paraissent plus sombres encore lorsqu'on les considère dans le contexte des clauses que comportent les statuts

de syndicats canadiens. Il suffit d'un bref examen des statuts syndicaux pour constater les abus, réels ou potentiels, auxquels ils prêtent. La citoyenneté et l'affiliation politique (pour ne rien dire du sexe), contreviennent aux principes démocratiques fondamentaux et, dans plusieurs juridictions, à des lois bien précises; les exigences de "bonne moralité" ou de compétence professionnelle, quoique souhaitables, peuvent donner lieu à des abus. Ces derniers ne sont cependant rien en comparaison des droits d'affiliation que prévoient les statuts de certains syndicats: la majorité des syndicats fonctionnent avec des maximums de \$50 ou moins, mais environ 28,000 travailleurs sont obligés de verser des droits allant de \$200 à \$500. On ne possède aucun chiffre en ce qui concerne les droits exigés des membres ou ceux qui doivent être versés pour l'obtention de permis de travail par les non membres. On peut toutefois supposer que les uns et les autres sont très élevés. En définitive, ce domaine de la loi est un terrain hérissé d'innombrables difficultés.

Il est clair que toute ingérence dans les droits de ces organismes qui se prétendent "privés" suscite des problèmes d'une certaine ampleur. Et pourtant, on se demande toujours si les syndicats devraient pouvoir refuser l'adhésion de certains des travailleurs pour lesquels ils négocient en s'appuyant sur des pratiques arbitraires et socialement insatisfaisantes: cela affaiblit la cohésion morale du syndicat, accroît l'antipathie du public à l'égard du mouvement syndical et place des travailleurs dans une situation où ils ne sont pas en mesure de participer aux décisions qui régissent leurs contrats de travail. Il ne fait aucun doute que certaines modifications devront être de nature législative: le droit coutumier ne semble pas susceptible de se modifier assez rapidement pour corriger la situation actuelle dans un délai raisonnable. Il faudrait par conséquent que les commissions

des relations de travail soient en mesure d'infliger des sanctions à n'importe quel syndicat qui imposerait des exigences d'admission déraisonnables, l'appréciation de ce que l'on entend par déraisonnable étant du ressort de la commission intéressée. Un problème plus délicat consiste à déterminer s'il y aurait lieu de créer une agence habilitée à contraindre directement un syndicat à accepter un travailleur parmi ses membres. Une telle solution n'est pas viable et, si l'on accepte d'autres suggestions faites dans le présent rapport, la nécessité d'appliquer pareille mesure pourrait être considérablement réduite.

CHAPITRE IV: PROTECTION PROCEDURALE DU DROIT D'AFFILIATION

Il résulte clairement de ce qui précède que l'on ne devrait pas priver arbitrairement qui que ce soit du droit d'affiliation syndicale, et des avantages qui en découlent. De même, ne pas se conformer à la justice naturelle fondamentale à l'égard de n'importe quel aspect de l'action disciplinaire d'un syndicat ne peut que miner la confiance des membres de ce syndicat et son efficacité en tant qu'agent négociateur, et provoquer, en fin de compte, l'échec du régime des négociations collectives pour le syndicat en cause.

Dans ce domaine, les tribunaux ont mis au point un système cohérent et assez satisfaisant pour la protection des droits de l'individu. C'est sans aucun doute que, exception faite du caractère privé d'un syndicat, il est plus facile de se représenter des raisons de protéger un droit déjà existant que de voir l'obligation que peut avoir un syndicat d'accepter un travailleur parmi ses membres. A l'origine, les tribunaux déclaraient qu'ils intervenaient pour protéger les droits acquis d'un membre d'un syndicat sur les biens de ce syndicat. Etant donné que cette attitude n'était possible que

lorsque le syndicat possédait des biens, et qu'elle ne tenait pas compte d'importantes valeurs non matérielles, elle a été rejetée en faveur d'une base contractuelle pour l'intervention, les tribunaux étant enclins à intervenir pour faire respecter les clauses de la constitution d'un syndicat qui sont à la base des rapports contractuels entre les adhérents. Malheureusement, la théorie du contrat n'assure, sans qualifications substantielles, aucune protection réelle aux adhérents. En tant que fait social, par opposition à un fait légal, il est évident que la situation d'un membre d'un syndicat est basée davantage sur le statut que sur le contrat. La situation de la grande majorité des membres en instance d'affiliation est qu'ils n'ont d'autre choix que d'adhérer au syndicat, ou de le rejeter; aucun d'entre eux n'a le pouvoir de négocier les conditions auxquelles il adhèrera au syndicat. Malheureusement, et bien qu'il soit reconnu, le fait social a rarement trouvé son expression dans les verdicts des tribunaux. Quoi qu'il en soit, il y a une bonne mesure de souplesse dans la théorie des contrats, et notamment dans ceux qui résultent de conditions implicitement reconnues par les tribunaux du fait de la nature de l'accréditation.

Etant donné que les tribunaux insistent sur l'élément contractuel en tant que base d'intervention dans les cas d'expulsion, une règle s'est fermement établie en droit canadien, à savoir que le membre exclu doit, avant de porter sa cause devant les autorités judiciaires, épuiser tous les recours internes prévus par les statuts du syndicat. En dépit de certaines lacunes possibles, une telle règle est nécessaire, car il faut donner aux syndicats la possibilité raisonnable de corriger les erreurs commises par les organismes qui leur sont subordonnés, afin d'assurer l'autonomie de leur gestion interne. Les tribunaux canadiens se sont cependant rendu compte que, étant donné que l'expulsion d'un syndicat équivaut à une mort industrielle, il y

a lieu d'éviter une application trop stricte de cette règle. En général, les tribunaux se sont efforcés d'améliorer ce type de règle et, sur vingt cas où la clause d'épuisement des recours internes était applicable, il n'y en a que quatre où le plaignant a été requis de se conformer aux dispositions prévues par les statuts du syndicat. Il ne fait aucun doute que cette attitude est en partie attribuable à une croyance assez répandue dans le public concernant la lenteur et la relative inaccessibilité des tribunaux d'appel syndicaux. Un examen des statuts des syndicats indique que de telles craintes sont parfaitement fondées: l'organisme d'appel de dernière instance est généralement la convention du syndicat, qui ne se réunit généralement pas tous les ans, et les échelons inférieurs de procédure sont assez douteux. Etant donné que les règles exigeant l'épuisement de tous les recours constituent essentiellement l'application du précepte maxim pacta sunt servanda à la constitution des associations non incorporées, une première exception qui s'en écarte est que les auditions prévues doivent se conformer exactement aux dispositions de la constitution du syndicat; dans le cas contraire, l'action est ultra vires et, par conséquent, entachée de nullité. Une autre limitation qui vient se dresser ici est que la procédure d'expulsion doit être conforme aux préceptes de la justice naturelle. Certes, sur ce second point, nombre d'autorités soutiennent que toute stipulation d'une constitution syndicale qui n'est pas conforme aux principes de la justice naturelle doit être tenue pour invalide. Par conséquent, le problème qui se pose aux tribunaux dans les situations ultra vires consiste simplement à interpréter les statuts du syndicat et à déterminer si les actes en question trouvent un appui réel ou implicite. A cet égard, la jurisprudence a strictement limité le champ de leurs activités. Cette tendance a donc opéré à l'avantage des travailleurs. Dans 19 cas portant sur des exclusions de syndiqués, à

l'égard desquels les tribunaux sont intervenus pour modifier l'action du syndicat, ce fut sept fois pour des raisons ultra vires et neuf fois pour des raisons de justice naturelle, les trois autres cas impliquant la conspiration ou la protection d'un droit statutaire.

Les tribunaux sont en train de mettre au point des règles que les syndicats doivent respecter dans les cas d'expulsion faute de quoi, même s'il n'en résulte aucun dommage, il y a intervention des tribunaux. Il semble évident qu'un syndiqué doit avoir droit à une audition réelle avant que le syndicat puisse prononcer son expulsion, et que cette audition ne peut pas être interdite par les statuts du syndicat. De telles auditions ne doivent pas nécessairement se dérouler de la même façon que celles d'un tribunal officiel. On entend ici par "audition réelle" que le syndiqué en question doit être informé des accusations portées contre lui, et de la date de l'audition. En ce qui concerne cette dernière exigence, l'audition doit avoir lieu dans un endroit accessible au syndiqué, et à une date pas trop éloignée. L'accusé doit avoir le droit d'assister à l'audition, de procéder au contre-interrogatoire des témoins, et de présenter sa défense aux personnes qui jugent la cause. Il n'a pas le droit de se faire assister par un avocat, ni d'exiger que les preuves soient fournies de façon déterminée. Les tribunaux exigent que les juges chargés de ces causes ne soient pas changés en cours d'affaire, ni influencés.

La pratique, telle qu'elle ressort des statuts des syndicats, ne semble nullement conforme à ces exigences des tribunaux. Abstraction faite des questions portant sur les raisons de l'expulsion, il semble que les garanties de procédure soient rares, ce qui est peut-être imputable au fait que les jugements ont généralement lieu à des niveaux inférieurs où l'on peut s'attendre

à une grande expérience de ces causes. Par exemple, les délais d'appel ne sont absolument pas conformes aux stipulations ci-dessus. C'est uniquement en ce qui concerne le droit à l'assistance d'un avocat, du reste non exigé par la loi, qu'il existe une protection de nature procédurale. Par conséquent, on peut en déduire que les exigences de justice naturelle posées par les tribunaux sont loin d'être scrupuleusement respectées dans la réalité.

Les tribunaux mettent également au point un processus de protection de l'individu qui n'appartient à aucune de ces catégories traditionnelles, puisqu'il concerne les limitations apportées aux accusations circonstanciées qui peuvent servir de base à l'expulsion. C'est ainsi qu'il a été soutenu qu'un syndicat ne peut légalement expulser un membre parce que ce dernier aurait refusé de s'adonner à des activités syndicales elles-mêmes illégales, c'est-à-dire délictueuses. Il est également clair qu'une telle activité peut donner lieu à une action en dommages-intérêts intentée contre le syndicat ou son comité exécutif. Une voie entièrement nouvelle se trouve de ce fait ouverte aux tribunaux pour la protection des travailleurs contre les abus de la sécurité syndicale, étant donné qu'il peut y avoir illégalité tant au titre de dispositions légales qu'à celui du droit coutumier.

Les tribunaux s'emploient également à élargir les formes de redressement disponibles en pareils cas: bien que l'on ne puisse, contrairement aux sociétés, obtenir une injonction de redressement intérimaire pour empêcher l'application de la clause de sécurité syndicale, une telle injonction peut être prononcée contre le syndicat si l'accusé est en mesure d'émettre un "doute raisonnable" quant à l'observation, par le syndicat, des exigences de la justice naturelle. Des déclarations et des dommages-intérêts peuvent également être obtenus, la portée de ce dernier redressement étant toutefois

amoindrie du fait que, jusqu'à tout récemment, de telles actions devaient être intentées contre des particuliers, et non contre un syndicat dans son ensemble. Il est cependant clair que le droit coutumier tend très nettement à conférer aux syndicats une nature de quasi-sociétés et que, de ce fait, cette difficulté de procédure est sur le point d'être surmontée.

Quant à la question de savoir s'il y a protection judiciaire suffisante dans les cas d'expulsion, les opinions sont partagées. Certains partisans du statu quo soutiennent que les tribunaux offrent une protection suffisante pour obliger les syndicats à respecter leurs statuts, mais ils oublient que les règles elles-mêmes peuvent être à l'origine du mal. D'autres insistent sur le fait que la situation actuelle a pour effet de favoriser "une régie interne indépendante". Ces arguments sont loin d'être convaincants, étant donné que l'importance accordée à l'aspect des rapports contractuels entre un syndicat et ses adhérents limite nécessairement la souplesse de l'attitude qui s'impose à cet égard. Pour maintenir le principe des négociations collectives, il faut traiter un travailleur d'une façon qui soit conforme aux exigences sociales de l'heure. Ce qui ne veut pas dire qu'on oublie que le problème réel, lors de l'évaluation des procédures disciplinaires actuelles, est de déterminer si le syndicat lui-même devrait continuer d'être le seul juge de l'à-propos des règles circonstanciées qui constituent la base de toute affiliation syndicale.

Nous sommes d'avis que les lois régissant ces questions devraient renfermer un minimum de garanties de procédure. Les règles adoptées jusqu'à présent par les tribunaux, bien que passablement acceptables du point de vue théorique, sont cependant trop vagues pour pouvoir être appliquées dans la pratique quotidienne d'un local syndical. De plus, ces exigences

n'apparaissent pas clairement aux simples syndiqués du point de vue du profane, les directives législatives expresses sont bien plus efficaces. C'est pourquoi nous suggérons l'adoption d'une législation similaire à celle des Etats-Unis. Le cas échéant, il faudra cependant faire en sorte de préciser davantage les dispositions concernant le droit à l'audition.

Des critiques théoriques ont longtemps été formulées contre les tribunaux en tant qu'arbitres de ces questions: on leur reprochait notamment d'être fort onéreux aux points de vue temps et argent et de ne se prononcer qu'avec réticence sur les questions dont ils avaient à connaître. Ces arguments semblent fondés: ne serait-ce qu'en fonction du temps qui s'écoule entre l'application d'une mesure disciplinaire et le jugement définitif du tribunal, après enregistrement. Il serait injuste de laisser se perpétuer la situation actuelle. A cet égard, il y a lieu de noter que près de la moitié des cas vont au delà du stade de l'instruction. La question qui se pose alors est évidemment la suivante: qui peut être habilité à remplir cette tâche? Il semble y avoir trois possibilités: (i) les commissions des relations de travail existantes; (ii) certaines variantes de la commission de révision publique de l'Union internationale d'Amérique des travailleurs de l'automobile, de l'aérospatiale et des instruments aratoires (U.A.W.); et (iii) les commissions d'arbitrage. Nous pouvons éliminer immédiatement la deuxième possibilité. Bien qu'elle puisse être viable dans le contexte de l'U.A.W., elle est beaucoup trop lente (en tant qu'organisme d'appel de dernière instance) pour satisfaire aux besoins de de domaine où le syndicat typique alors impliqué dans un litige serait un petit syndicat du Québec ou de la Colombie-Britannique. En ce qui concerne les commissions des relations de travail, on a soutenu que le recours à une telle mesure compromettrait leur position en tant qu'arbitres impartiaux

et que le champ de leur compétence ne les prépare pas suffisamment à se prononcer dans des conflits opposant un syndicat à ses adhérents. On a suggéré que les questions de discipline syndicale soient assujetties à un ensemble de dispositions assimilable à la procédure applicable aux griefs, en affirmant que cette dernière offrait plus de souplesse. Disons tout de suite que l'argument selon lequel une "juste cause" pourrait constituer une directive trop vague peut être réfuté par le fait que les commissions d'arbitrage ont longtemps appliqué le concept de "juste cause" avec beaucoup de succès. Cependant, un certain nombre des problèmes qui se posent ici pourraient être résolus par le recours à un processus d'arbitrage mis au point par une section spéciale de la commission des relations de travail. Cela aurait l'avantage de ne pas compromettre la position d'impartialité de la commission; ce serait une solution rapide et peu coûteuse, qui permettrait la mise au point d'une théorie clairement formulée de "juste cause" dans ce domaine.

CHAPITRE V: LA PORTEE DES DECISIONS SYNDICALES EXECUTOIRES

Comme nous l'avons noté, les syndicats sont généralement libres d'inclure dans leurs statuts toutes les clauses d'ordre disciplinaire qu'ils désirent y faire figurer, le seul critère limitatif étant que lesdites dispositions ne doivent enfreindre aucune loi d'application générale ni, comme la chose s'est produite à l'occasion, pouvoir constituer, de l'avis des tribunaux, une contravention aux pratiques d'intérêt public. Il serait intenable et intolérable de laisser se perpétuer une telle situation. Il importe cependant d'éviter toute intervention excessive, qui risquerait d'émousser l'intérêt des membres du syndicat à l'égard d'améliorations réalisées de l'intérieur.

(i) Validité des décisions en matière de mesures disciplinaires: Un examen des statuts des syndicats démontre qu'ils spécifient tous un nombre déterminé de délits, avec de nombreuses variantes qui résultent de l'importance plus ou moins grande qu'on y attache à tel ou tel domaine. Les interdictions dont les constitutions sont généralement parsemées vont des plus simples aux plus compliquées. A l'exception d'une seule où l'on mentionnait les raisons des mesures disciplinaires envisagées, toutes les constitutions contenaient au moins une interdiction "passe-partout" ne donnant aucune définition explicite du type de comportement interdit. En pratique, cependant, certaines de ces dispositions générales ont tendance à être aussi catégoriques et aussi précises que n'importe quelle clause formulée de façon expresse. Par conséquent, et bien que ces clauses générales puissent sembler exagérément vagues, la procédure disciplinaire dans son ensemble servira généralement à empêcher l'application de pénalités pour des raisons indéfinies. Il est intéressant de noter également que ces délits de nature générale ont donné naissance à plus de litiges que n'importe quel autre type de clause, y compris celle de la double appartenance, et que les tribunaux ont été assez favorables aux plaignants dans ces cas.

Le contrôle de la garde des fonds et des avoirs syndicaux est expressément prévu par les constitutions d'au moins 41 syndicats. En général, ces clauses portent soit sur le non-paiement des montants dus aux syndicats ou sur l'appropriation frauduleuse ou le détournement des fonds syndicaux. Dans ce dernier cas, il s'agissait typiquement d'un délit commis par un agent du syndicat. Il ne semble pas que de telles clauses nécessitent une intervention. Les constitutions syndicales dénoncent de façon extrêmement explicite tout comportement menaçant l'existence du syndicat, y compris le défaut d'épuiser les recours internes, la double appartenance, le brisement des

grèves et la divulgation de secrets syndicaux, le délit le plus fréquemment évoqué étant celui de la double appartenance. Ce type de délit a constitué dans ce domaine, la source de la plupart des litiges. Dans ce domaine, le cas qui suscite le plus d'inquiétude se produit lorsque quelqu'un s'oppose à la politique du syndicat, non pas dans le but de s'opposer au syndicat en tant que tel, mais simplement pour essayer d'inviter le syndicat à modifier sa politique. Une telle action pourrait sembler souhaitable en ce sens qu'elle tendrait à restreindre les pratiques corrompues de la part d'un exécutif syndical solidement installé. Malheureusement, la législation actuelle n'offre aucune garantie aux protestataires, pas même à l'égard de la clause de sécurité syndicale. C'est pourquoi il y aurait lieu de promulguer de nouvelles lois tendant à protéger les personnes faisant partie des "minorités" au sein des syndicats.

Nous suggérons de tenir compte des considérations ci-après dans la formulation des clauses d'une telle législation: dans le cas de brisement de grève, il nous semble qu'il est extrêmement important de sauvegarder la solidarité interne du syndicat pendant une période de grève, et que, par conséquent, les clauses qui définissent les délits dans ce domaine devraient être considérées comme valides dans la mesure où la grève en question a un caractère légal. De même, la divulgation des secrets syndicaux, qui constitue un point important de la plupart des constitutions, devrait se voir accorder un traitement similaire. En ce qui concerne le défaut d'épuiser tous les recours internes, nous avons estimé raisonnable d'exclure de telles clauses des statuts syndicaux en les déclarant inapplicables. En ce qui concerne les clauses disciplinaires concernant l'activité subversive, nous doutons qu'il faille tolérer de telles clauses lorsque l'activité en question n'est pas illégale en soi. Particulièrement dans le domaine de l'appui de partis

politiques, à l'exception peut-être d'un parti dont la campagne électorale a été violemment anti-syndicale.

En ce qui concerne les élections, l'examen des statuts et des interdictions qu'ils comportent ne fait pas apparaître le besoin d'une intervention de l'Etat. Des considérations similaires s'appliquent également au cas où des délits moraux sont définis dans les statuts syndicaux. L'examen des clauses de pénalité énoncées dans les statuts syndicaux indiquent que la plupart d'entre elles se bornent à prévoir des amendes, la suspension ou l'expulsion. Il est évident qu'il serait souhaitable que les statuts définissent une gamme plus vaste et plus nuancée de pénalités, ce qui suggérerait à l'esprit de ceux qui ont à juger un syndiqué un éventail de possibilités plus nuancé. Sauf en ce qui concerne la fixation d'un plafond au montant des amendes, nous ne proposons aucune intervention dans ce domaine.

(ii) Les syndicats et l'action politique: Certains milieux ont toujours éprouvé de l'hostilité à l'égard de l'engagement des syndicats en tant que tels dans les affaires politiques, leur sentiment étant qu'une telle activité viole les principes démocratiques en contraignant chaque syndiqué à accorder son appui à des partis politiques qui peuvent ne pas leur plaire. Il est évident qu'il n'y a pas lieu d'interdire aux syndicats de prendre part aux luttes politiques. La raison même de la nécessité d'une telle action est claire: le syndicat doit défendre ses intérêts aussi bien que n'importe qu'elle société.

Plusieurs suggestions importantes ont été faites pour tenir compte de ce problème: une mesure législative interdisant aux syndicats de canaliser, directement ou indirectement, les retenues syndicales vers les partis politiques, et permettant aux sociétés de refuser de verser de telles sommes aux

syndicats à moins que ces derniers ne s'engagent par écrit, chose dont le caractère inacceptable est tellement évident que ce n'est même pas la peine d'en discuter, a été édictée. Une autre méthode inacceptable d'aborder le problème consiste à diviser les cotisations syndicales en deux parts, en spécifiant laquelle des deux "n'est pas raisonnablement nécessaire et liée au but de la négociation collective". Selon cette théorie, l'action politique est réputée tomber dans la dernière catégorie. Exiger la collecte de ces sommes est considérée comme un acte illégal et, de ce fait, passible d'injonction. Etant donné que la thèse que nous avançons dans ce précis est que l'action politique est nécessaire au bon fonctionnement du syndicalisme, une telle situation doit être écartée. Pour la même raison, il y aurait lieu de rejeter le principe anglais du refus de participer, appliqué aux dépenses politiques. De même, nous rejetons la position adoptée par la loi américaine Federal Corrupt Practices Act qui, en pratique, a été réduite à presque rien. Etant donné que les interdictions pures et simples n'ont pas donné les résultats souhaités, on a suggéré que la bonne solution consisterait à fixer une limite aux contributions monétaires d'un syndicat. De telles limitations nous paraissent déraisonnables si l'on tient compte des montants que peuvent actuellement atteindre les dons.

Un problème plus difficile concerne le pouvoir d'un syndicat d'appliquer des mesures disciplinaires à ses membres s'ils ne se conforment pas à certaines règles syndicales concernant l'activité politique. J'estime qu'une telle position serait intenable, dans d'autres pays favorables à cette théorie. Il serait cependant utile que des lois jettent une entière lumière sur ce point.

(iii) Représentation équitable lors des négociations: En ce qui concerne la discrimination à l'encontre de certains groupes de syndiqués lors de la négociation d'une convention collective, il n'y a pas de limite aux possibilités qu'a le syndicat de discriminer à l'égard de certains individus ou de certains groupes de membres. Bien qu'il soit difficile d'obtenir des renseignements dans ce domaine, il est évident que de tels abus sont fréquents, comme en témoignent les échelles de salaires qui sont en contravention avec les dispositions des lois sur le salaire égal, et les décisions judiciaires mentionnées dans ce domaine. Pour résoudre ces problèmes, on dispose de trois méthodes: (i) de lois précises rendant certaines pratiques illégales; (ii) de l'action des tribunaux; (iii) de l'intervention d'une commission des relations ouvrières. En ce qui concerne le premier point, la plupart des juridictions canadiennes comportent quelque chose d'équivalent au Federal Female Employees Equal Pay Act, (Loi fédérale sur l'égalité des salaires pour les femmes). Bien que de telles lois n'aient pas eu un succès absolu, il pourrait être utile d'en resserrer les clauses. En ce qui concerne l'action des tribunaux, nous ne pouvons dire que peu de choses du fait des délais inévitables et des difficultés qu'il y a à déterminer d'avance quels seront les droits. Par contre, l'intervention des commissions des relations ouvrières semble être utile dans ce domaine. On disposerait ici d'un remède qui est le refus ou le retrait d'accréditation aux syndicats qui pratiqueraient la discrimination à l'égard de certains de leurs membres. Pour l'instant, de telles décisions peuvent être prises au moment de la demande initiale d'accréditation, mais ce n'est pas toujours le cas par la suite. Nous sommes donc d'avis que quelque chose de similaire à la doctrine Steele établie aux Etats-Unis pourrait s'avérer utile, étant donné que cette doctrine énonce qu'un syndicat a le devoir de représenter justement et

équitablement tous ceux qu'il représente. Le défaut de se conformer à cette obligation entraînerait la perte de l'accréditation.

CHAPITRE VI: LA PARTICIPATION DES SYNDIQUES A LA PRISE DE DECISIONS

Trois types généraux de questions émergent dans ce domaine: (i) quelles sont les décisions qui doivent être prises au-dessus du niveau local; (ii) quelles sont les décisions qui devraient être prises à l'échelon local par voie de vote, et (iii) dans quelles conditions doit se dérouler le vote. Lorsqu'on examine ces trois points, il y a lieu de noter tout d'abord que l'on ne dispose que de peu de documents dans ce domaine et ensuite que, sauf en ce qui concerne le choix d'un représentant lors des négociations, l'appartenance à un groupement de négociation n'entraîne pas automatiquement le droit de vote — ce droit n'est conféré que par l'adhésion syndicale, et encore uniquement en vertu de la constitution du syndicat.

En ce qui concerne le premier point, on considère comme critère normal que les décisions affectant les conditions d'emploi doivent se prendre au niveau local. Les questions plus complexes de délimitation des compétences présentent plus de difficulté, le véritable problème consistant à déterminer dans quelle mesure les syndicats internationaux et nationaux peuvent imposer des tutelles aux sections locales, privant ces dernières du contrôle de leurs propres affaires comme l'envisagent généralement leurs statuts. Etant donné que l'on note une tendance très nette à s'en remettre à ce dispositif, et que la législation existant dans ce domaine ne s'efforce ni de limiter ni de réglementer son emploi, le problème est assez épineux. Les difficultés inhérentes à cette question ont été abordées par certaines commissions des relations ouvrières lorsqu'elles s'efforcent de déterminer si en fait, un syndicat leur est opposé. Dans les circonstances, il a été jugé que lorsque

les vœux des membres d'une section locale sont frustrés du fait d'une tutelle, le syndicat en question cesse d'être considéré comme "qualifié". Cependant, une telle législation n'existe pas dans la plupart des régions du pays. Nous suggérons donc que l'opinion ci-dessus soit incorporée à la législation.

Quant à savoir quelles décisions doivent être prises par voie de vote au niveau local, l'examen des statuts des syndicats existants montre que les sujets soumis au vote sont extrêmement nombreux. C'est ainsi que près de la moitié des travailleurs dont nous avons examiné le cas peuvent voter au début d'une grève, et la moitié d'entre eux également peuvent voter pour la ratification des conventions collectives. L'examen des statuts des syndicats indique que sur 50 que nous avons étudiés, 17 prévoient le droit de vote en matière de fixation de cotisations et 7 seulement pour l'augmentation des cotisations. Bien que ce soit là plus que l'on aurait pu s'y attendre, ce n'en est pas moins très insuffisant si l'on songe que les cotisations peuvent être utilisées non seulement pour aboutir à l'exclusion de certains syndiqués, mais encore qu'elles peuvent être imposées à des non-syndiqués qui font partie du groupement de négociation. Il semblerait ici qu'il y ait lieu au moins de faire voter les syndiqués, sinon tous ceux qui sont visés par la décision pour toute question d'obligation financière à l'égard d'un syndicat.

Comme nous l'avons noté plus haut, un nombre assez élevé de statuts prévoient le vote en cas de grève. Ici, on constate cependant certaines déficiences étant donné que tous les cas ne sont pas prévus, notamment la durée d'adhésion préalable requise pour voter, et les ingérences des dirigeants. Nous estimons qu'aucune grève ne devrait pouvoir être déclarée si ce n'est à la suite d'un scrutin secret. De plus, et bien que ceci puisse

être politiquement impossible, il semblerait que tous les membres d'un groupement de négociation devraient participer à un tel scrutin. Quant à la ratification d'une convention collective, les statuts prévoient le scrutin moins souvent que pour les cas de grève; nous pensons que des arguments similaires militent en faveur du droit de vote pour les syndiqués, à moins qu'on ne le confère à tout le groupement de négociation.

Il y a lieu de noter que la plupart des statuts ne prévoient pas la possibilité de modifier les statuts même par voie de scrutin à l'échelon local. Cependant, aussi longtemps que les questions ci-dessus continueront à être décidées à ce niveau, il nous semble qu'il n'y a guère lieu de modifier les règlements dans ce domaine.

En ce qui concerne les modalités du scrutin, on voit émerger trois problèmes généraux: (i) de quels renseignements un syndiqué devrait-il disposer avant de voter? (ii) comment devraient être menées les réunions au cours desquelles un scrutin a lieu? et (iii) le scrutin doit-il être secret ou public?

L'examen des statuts syndicaux indique qu'elles ne prévoient pratiquement aucune protection pour l'accès des membres à l'information. Par conséquent, il nous semble qu'il ne serait que juste d'adopter des lois qui donneraient à tout syndiqué le droit de connaître les statuts et les règlements de son syndicat et à tout membre du groupement de négociation de connaître le texte de la convention collective qui l'intéresse. De plus, les rapports financiers devraient au moins être mis à la disposition de tous les syndiqués et, si une cotisation de négociation est prélevée, toutes les personnes tenues de payer cette cotisation devraient jouir d'un droit similaire.

Bien que nous n'ayons pas étudié la façon dont les réunions syndicales sont menées au Canada, on peut raisonnablement supposer qu'elles ne sont pas toutes des modèles de démocratie parlementaire. Par conséquent, il y a lieu de se demander s'il ne serait pas souhaitable que des lois fixent certaines normes minimales en la matière, comme l'a fait la Landrum-Griffin Act. A ce propos, il semble évident que dans les cas où les lois exigent un scrutin, il devrait être secret; dans les autres cas, les syndiqués devraient pouvoir en décider librement. En résumé, nous suggérons que le vote de grève et la ratification des conventions collectives se fassent par scrutin secret.

CHAPITRE VII: LA PARTICIPATION DES SYNDIQUES A L'ADMINISTRATION DES AFFAIRES SYNDICALES

(i) Sélection et contrôle des fonctionnaires syndicaux: L'importance dans ce domaine est évidemment fonction de la mesure dans laquelle les décisions sont du ressort des fonctionnaires syndicaux, et de la mesure dans laquelle ces derniers sont accessibles aux membres de la base, et responsables par devant eux. La première de ces considérations a déjà été examinée, et il semble évident qu'un grand nombre de décisions sont prises par l'exécutif syndical; quant à la seconde, on ne peut que faire des suppositions, étant donné que l'on ne dispose pas de documents suffisants, mais on peut à bon droit supposer que l'accessibilité et la responsabilité qu'il peut y avoir proviennent dans une large mesure de considérations d'ordre "politique". Quoi qu'il en soit, il ne fait aucun doute que la question de la gestion syndicale soulève de grands problèmes dans le domaine des relations ouvrières, du fait de l'ampleur des pouvoirs qu'elle exerce. Malheureusement, on ne dispose que de peu de documents dans ce domaine.

Si l'auteur de ce précis peut se permettre une observation strictement personnelle, il semblerait que la qualité des hommes est, dans ce domaine, extrêmement variable.

En ce qui concerne la qualification à des postes syndicaux, la loi considère que ces derniers n'existent qu'en vertu des statuts syndicaux et que, à moins de dispositions stipulant expressément le contraire, tous les syndiqués sont admissibles. Il ressort de l'étude des statuts que ces derniers se bornent généralement à exiger qu'un syndiqué ait régulièrement payé ses cotisations pendant un certain temps avant de pouvoir faire partie du bureau. La plupart des statuts limitent cette période à un an au plus dans le cas des bureaux locaux, avec une période légèrement plus longue pour les postes dans les bureaux internationaux. Il ne nous semble pas qu'il y ait lieu de vouloir modifier, sur le plan juridique, quoi que ce soit à cette situation.

Les statuts syndicaux comportent également d'autres conditions d'admissibilité aux fonctions de bureau, dont aucune ne nous semble nécessiter de modifications. Parmi les limitations relevées, citons celle qui concerne l'affiliation politique au parti communiste ou l'exigence de la citoyenneté canadienne. Une troisième catégorie concerne la durée de l'adhésion syndicale préalable. On ne trouve ici que des exigences assez limitées en ce qui concerne la durée d'affiliation préalable dans le domaine de compétence du syndicat, ou en ce qui concerne l'appartenance au syndicat. Certains statuts exigent que les fonctionnaires syndicaux proviennent de la base, ou qu'ils aient détenu des fonctions à l'échelon local avant de pouvoir en détenir à l'échelon international. Un autre groupe d'exigences concerne le comportement legal ou moral. C'est ainsi que certains statuts excluent

les personnes ayant commis un acte criminel ou ayant été reconnues coupables d'un crime de turpitude morale. D'autres interdisent aux membres d'organisations juridiques de détenir des fonctions syndicales. Enfin, un certain groupe de restrictions portent sur des délits syndicaux: le racket dans une usine ou dans un syndicat, ou l'aide accordée à un syndicat rival.

En ce qui concerne le mode l'élection, les statuts étudiés indiquent que dans plus de la moitié des cas le scrutin secret est de règle pour l'élection des fonctionnaires syndicaux au niveau local. Au niveau international, ce nombre est un peu moins élevé, 14 statuts prévoyant un scrutin public ou par appel nominal. A l'échelon local, cependant, 18 statuts ne contiennent aucune disposition à cet égard; à l'échelon international, les chiffres sont légèrement inférieurs. On peut supposer que dans cette dernière catégorie, c'est le vote public qui prévaut. D'aucuns ont émis l'opinion que c'est là un domaine dans lequel il faudrait intervenir. A l'échelon local, l'élection des fonctionnaires au scrutin secret devrait être de règle, car c'est ici que peuvent se produire les cas d'oppression et de coercition à l'égard des dissidents. Etant donné qu'au-dessus du niveau local le scrutin se fait avec des participants différents, ce type de protection ne nous paraît pas requis.

Quant à la durée des mandats, aucune action ne peut être entreprise dans ce domaine, mais on peut noter que les mandats prévus sont généralement courts, surtout à l'échelon local. Par conséquent, il n'y a probablement pas à craindre de voir certains dirigeants syndicaux rechercher par ce moyen une inamovibilité de fait.

La mise à pied de membres du bureau aux termes des statuts est une question rarement évoquée. L'étude des statuts a démontré que neuf d'entre

eux seulement prévoient la révocation des membres du bureau, tant à l'échelon local qu'international; 19 autres syndicats prévoient seulement la révocation des membres du bureau à l'échelon international. Il semblerait déraisonnable de prévoir la révocation de tous les membres du bureau dans les circonstances appropriées. Il y a lieu de noter que la révocation de dirigeants syndicaux, contrairement à la perte de l'adhésion per se, n'est pas couverte par la justice naturelle.

Aucun des statuts que nous avons examinés ne fait mention des critères exigés des dirigeants syndicaux. On peut toutefois s'attendre à ce que le droit coutumier leur impose le niveau des fiduciaires. Il y a lieu de se demander s'il ne serait pas sage d'imposer aux dirigeants syndicaux, par voie de législation, "les normes de responsabilité les plus élevés quant à la gestion des affaires du syndicat". Une telle clause a du moins le mérite de clarifier la position du dirigeant syndical. On peut souligner ici que les administrateurs de sociétés ont été assujettis à des dispositions législatives similaires.

(11) Les droits de l'individu dans la procédure des griefs: De toute la législation du travail au Canada, il ressort que le règlement des conflits découlant de l'interprétation des conventions collectives doit se faire par voie d'arbitrage. De plus, il ressort des termes utilisés que c'est là le seul moyen par lequel les conflits devraient être réglés. Tout récemment encore, cela s'est trouvé confirmé par la pratique. La raison profonde d'une telle position réside dans la théorie selon laquelle les clauses d'une convention collective constituent des "droits de groupe", et que c'est par conséquent le groupe dans son ensemble, et non pas ceux qui le composent, qui devrait en assurer l'application. Il en résulte que

le groupe devrait avoir le droit de signer un accord, de parvenir à un compromis ou de renoncer à son grief, comme il le juge bon. Cela permet de sacrifier les intérêts d'un individu à ceux de la majorité, mais on espère que, dans la pratique, cela aboutira au plus grand bien de tous. Cette vue a parfois été exprimée dans les statuts syndicaux qui interdisent parfois aux syndiqués le droit d'introduire un grief et parfois ne le lui permettent qu'avec l'assentiment des membres du syndicat. Naturellement, cela donne à certains le sentiment que cette situation est injuste à l'égard des travailleurs concernés. En conséquence, les tribunaux ont essayé, dans ce domaine, de venir au secours de l'individu.

Le premier domaine dans lequel les tribunaux ont accordé leur protection à l'individu est la protection des droits de procédure pendant l'arbitrage en exigeant que les procédures des commissions d'arbitrage soient conformes aux principes de la justice naturelle, comme nous l'avons discuté précédemment. A l'origine, cette protection était accordée aux parties traditionnelles. Maintenant, cependant, les tribunaux ont commencé à accorder une protection identique aux individus dont les intérêts sont affectés par un tel arbitrage. Bien que l'on se rende compte qu'une telle attitude puisse susciter un certain nombre de difficultés, la principale réside dans le fait qu'une telle protection ne s'étend qu'à des cas d'arbitrage effectivement tranchés: elle ne touche pas les compromis qui peuvent intervenir avant l'arbitrage.

Pour résoudre, en partie, ce problème général, les tribunaux ont commencé à fournir aux syndiqués un moyen de recours qui leur permet d'éviter l'arbitrage et de porter un grief directement devant les tribunaux. Le résultat d'affaires semblables n'est pas encore clair. Les rapports que nous

connaissions n'indiquent pas si les tribunaux permettent une telle action en vertu de la convention ou en vertu de certains principes de droit coutumier, bien qu'il y ait lieu de penser que la dernière hypothèse est la bonne. Cette tendance de la part des tribunaux est cependant pleine de risques. Notamment, il y a la difficulté de faire concorder les deux systèmes et certains indices permettent de croire que les commissions se détourneront de la procédure d'arbitrage. S'il en est ainsi, le système bien équilibré de règlement des conflits que nous connaissons actuellement cesserait d'exister.

Plutôt que de permettre à la tendance actuelle de se poursuivre, nous proposons de limiter l'intervention des tribunaux dans ce domaine. Il est évident que pour obtenir un système rapide, clair et peu coûteux de régler les conflits, il y a lieu de renforcer le processus d'arbitrage. Ce faisant, il ne faut cependant donner aux individus aucun droit extensif au cours de ce processus. C'est pourquoi il faudrait, au début, accorder aux syndicats le droit de se montrer à la hauteur des responsabilités qui lui ont été conférées par l'accréditation, en procédant à un tri pour éliminer les griefs vraiment frivoles, qui ne pourraient qu'embouteiller la procédure des griefs. Si le travailleur en question n'est pas satisfait de cette disposition, il devrait pouvoir soumettre à arbitrage les questions qui le touchent personnellement, les intérêts "critiques" de son travail. A cet égard, nous conseillons de conférer aux syndicats le droit exclusif de négociation, mais les travailleurs auraient individuellement le droit de soumettre des griefs à leurs employeurs, de les faire régler sans l'intervention du représentant négociateur aussi longtemps qu'un tel règlement n'est pas incompatible avec les clauses de la convention collective en vigueur à ce moment, et à condition que le représentant négociateur ait eu l'occasion d'empêcher un tel

règlement. Evidemment, une telle position laisse en suspens un certain nombre de problèmes pratiques: qui assumera les frais? qui procédera au choix de l'arbitre? quelle sera la position du syndicat dans ces cas? tous ces problèmes peuvent être aisément résolus. Il y a simplement lieu de souligner que les travailleurs devraient au moins assumer une partie des frais encourus, et que les syndicats devraient être autorisés à participer aux audiences.

NOTES

